THE GAY RIGHTS CANON AND THE RIGHT TO NONMARRIAGE

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In the line of cases from Romer v. Evans to Obergefell v. Hodges, lesbian, gay, bisexual, and transgender ("LGBT") people went from outlaws to citizens entitled to dignity and equality. These decisions represent incredible successes for the LGBT rights movement. Some who support LGBT equality, however, argue that these victories came at a great cost: the gay rights canon, it is said, entrenches the supremacy of marriage and the marital family.

Marriage equality skeptics are right to be concerned about this possibility. Marriage is increasingly a marker of privilege. Individuals who marry and stay married are disproportionately likely to be white and more affluent. It is also important, however, not to overlook the more progressive potential of the gay rights canon. This Article reclaims this potential.

This Article offers two novel and important contributions. First, it identifies and gives substance to the constitutional principles of the gay rights canon. Second, this Article uses the principles of the gay rights canon to offer a rereading of Obergefell. This progressive rereading supports, rather than forecloses, the extension of constitutional protection to those living outside marriage.

INTRODUCTION

It has been a remarkable two decades for gay rights advocacy. Starting with *Romer v. Evans*,[1] and culminating (for now) with *Obergefell v. Hodges*,[2] lesbian, gay, bisexual, and transgender ("LGBT") people went from being treated as outlaws and outcasts to being treated as citizens entitled to dignity and respect. These decisions represent tremendous victories that should be celebrated. Many who celebrate the results in these gay rights cases, however, criticize the Supreme Court's route to these ends.[3] A growing chorus of legal

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[1] 517 U.S. 620, 635 (1996) (holding that a Colorado constitutional amendment violates the Equal Protection Clause because it "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else").

[2] 135 S. Ct. 2584, 2608 (2015) ("[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

[3] *See, e.g.*, Clare Huntington, Obergefell*'s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 31 (2015) ("Justice Kennedy's denigration of nonmarital families, even if unintentional, is deeply troubling. By reifying the social front of family as children with married parents, and by penning an unnecessary paean to marriage, Justice Kennedy made the lives of nonmarital families lesser."); Anthony C. Infanti, *Victims of Our Own Success: The Perils of* Obergefell *and* Windsor, 76 OHIO ST. L.J. FURTHERMORE 79, 82 (2015) ("[T]he *Obergefell* and *Windsor* decisions have reified the privileged position of marriage in our laws."); *id.* ("[*Obergefell*] has actually set back the movement for equal legal treatment of all regardless of relationship status."); *id.* at 83-84 ("[T]he LGBT rights movement has not only stanched efforts to erode the importance of marriage and marital status in the tax laws but it has actually made marriage even more important than it had been."); Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1209 (2016) ("But there is also cause for serious concern—even alarm.");

scholars argues that the Court's gay rights decisions further entrench the supremacy of marriage.

Deborah Widiss, for example, expressed this concern after *United States v. Windsor*.[4] In rectifying a "deep inequality in the law—that lawful same-sex marriages were denied federal recognition," Widiss stated, "[the *Windsor* opinion] suggests that marriage is clearly superior to other family forms."[5] Since the release of the Court's most recent gay rights decision in *Obergefell*, there has been an outpouring of similar critiques. Melissa Murray writes that the *Obergefell* decision should be cause for concern, even alarm. The majority opinion in *Obergefell*, Murray explains, "reads like a love letter to marriage."[6] Marriage is described as embodying "the highest ideals of love, fidelity, devotion, sacrifice, and family."[7] This "ideal" family form is contrasted with life outside of marriage or what Murray calls "nonmarriage."[8] Nonmarriage is

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Catherine Powell, *Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 FORDHAM L. REV. 69, 69-70 (2015) ("The problem with *Obergefell*, however, is that in the majority opinion, Justice Kennedy's adulation for the dignity of marriage risks undermining the dignity of the individual, whether in marriage or not." (footnote omitted)); Nan D. Hunter, *The Undetermined Legacy of 'Obergefell v. Hodges*,*'* NATION (June 29, 2015), http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges [https://perma.cc/A5KZ-VFGQ] ("But beware: There are razors in this apple. Justice Kennedy's opinion for the Court reached for what he no doubt genuinely believes are the stars, but it wrapped a legal interpretation that is both profound and simple in a miasma of rhetoric about marriage that is both sententious and simplistic.").

[4] 133 S. Ct. 2675, 2696 (2013) (holding DOMA invalid because it had the "purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity").

[5] Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 552 (2015); *id.* at 549 ("*Windsor* thus implicitly resurrects and reinforces claims that non-marital childrearing—and sexual relationships outside of marriage, more generally—are inherently less worthy of respect than marital relationships."); *id.* at 553 ("In 'raising up' same-sex marriages to comparable status with different-sex marriages, the [*Windsor*] opinion adopts rhetoric that denigrates non-marital relationships and childrearing."). Douglas NeJaime had made a similar point, suggesting that "while [*Windsor*] promises much freedom to the extent it provides equal treatment to same-sex couples, it also sends a powerful message about how relationships *should* look and function." Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 223 (2013).

[6] Murray, *supra* note 3, at 1212; *see also* Ashutosh Bhagwat, *Liberty or Equality?*, 20 LEWIS & CLARK L. REV. 381, 390 (2016) ("The entire opinion (as has been oft noted) is an extended ode to marriage, describing marriage as the ultimate, and essential, source of human dignity, and so liberty."); *id.* at 394 ("A related objection is that Kennedy's opinion in *Obergefell* assumes that marriage is necessary for happiness *and* dignity.").

[7] *Obergefell*, 135 S. Ct. at 2608.

[8] Murray, *supra* note 3, at 1210; *see also* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 960-67 (2000) (exploring a history of nonmarriage); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661, 665

portrayed not only as "undignified, less profound, and less valuable,"[9] but indeed as a "dismal affair."[10] Those living outside of marriage, the Court suggests, are "condemned to live in loneliness."[11] Widiss and Murray are far from the only scholars making such claims.[12]

This language about the profound nature of marriage and the eternal loneliness of unmarried persons is arguably dicta.[13] But because the gay rights canon consists of Supreme Court opinions and not op-eds,[14] marriage equality skeptics surely are right to fear that the decisions could nonetheless further

(2015) (characterizing nonmarriage as "coupled intimate relationships that are *not* recognized by the state under the rubric of civil marriage"). Nan Hunter uses the phrase "not-marriage." Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CALIF. L. REV. CIR. 107, 111 (2015).

[9] Murray, *supra* note 3, at 1210.

[10] *Id.* at 1215; *see also* Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other:* Obergefell *and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 126 (2015) ("In the process of explaining how vital marriage is to individuals and society, *Obergefell* repeatedly shames those who do not marry."); *id.* ("Peppered throughout the opinion are explicit statements that paint people who are not married as lonely, miserable, and inferior: they have no 'nobility and dignity'; they miss out on a 'unique fulfillment . . . that could not be found alone'; their children have 'a more difficult and uncertain family life'; they lie awake at night with the 'universal fear that [as] a lonely person [they] might call out only to find no one there'; their unions are less 'profound'; and they are 'condemned to live in loneliness.'" (quoting *Obergefell*, 135 S. Ct. at 2594, 2600, 2608)).

[11] *Obergefell*, 135 S. Ct. at 2608; *see also id.* at 2600 ("Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."); Huntington, *supra* note 3, at 29 ("Justice Kennedy's opinion reinforces the notion that these [nonmarital] families are deviant."); *id.* at 30 ("Justice Kennedy's framing reinforces family law's neglect of nonmarital families.").

[12] *See, e.g.*, Carpenter & Cohen, *supra* note 10, at 126; Huntington, *supra* note 3, at 29; Infanti, *supra* note 3, at 82; Powell, *supra* note 3, at 69-70.

[13] The latter surely is; it is less clear about the former. *Cf.* Murray, *supra* note 3, at 1240 ("In *Obergefell*, the Court promotes marriage—and only marriage—as the normative ideal for intimate life. And critically, in endorsing marriage so vigorously, the *Obergefell* decision goes beyond simply favoring marriage over potential alternatives; it gestures toward the repudiation of the jurisprudence of nonmarriage and its aspirations for nonmarital equality . . . . [T]he decision cultivates the conditions under which courts and legal actors may renege on the existing constitutional protections for nonmarriage that *Lawrence* and its ilk offered, leaving those who live their lives outside of marriage in a constitutionally precarious position.").

[14] *See* Murray, *supra* note 3, at 1210 ("Some may dismiss the decision's hyperveneration of marriage as nothing more than rhetorical flourish . . . . But this misses the point . . . . *Obergefell*'s rhetoric further entrenches marriage's cultural priority, and indeed, makes it a matter of constitutional law.").

solidify marriage's privileged status.[15] Rules privileging marital relationships over nonmarital ones can have profound consequences for the millions of American adults living outside of marriage.

Throughout our history, the law has privileged marital families. Until recently, having sex outside of marriage (i.e., fornication) and living together outside of marriage (i.e., cohabitation) were criminal acts.[16] The civil law also discouraged nonmarital relationships. For example, courts universally refused to enforce agreements between unmarried partners.[17] As the Restatement of Contracts explained, "[a] bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal."[18]

Today, fornication and cohabitation are no longer crimes.[19] However, individuals in nonmarital relationships continue to be denied a wide range of rights and protections that are extended to married spouses.[20] Regardless of how long they have been living together or how financially independent they are, unmarried partners typically cannot sue for wrongful death.[21] Unmarried

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[15] *See, e.g.*, Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1279 (2015) ("Marital supremacy—the legal privileging of marriage—endures, despite soaring rates of nonmarital childbearing and a widening 'marriage gap' that divides Americans by race, wealth, and education." (footnote omitted)); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 91 (2014) ("Even if [LGBT] advocates wished to destabilize marriage—and certainly some did—they were constrained by a legal, political, and cultural framework that prioritized marriage in the recognition of familial and sexual relationships.").

[16] CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 12-13 (2010) ("Although they were not illegal at common law, the early American colonies quickly passed statutes criminalizing adultery and fornication (sexual intercourse between unmarried persons).").

[17] Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 311 (2008) ("The principle that cohabitation in itself—a 'meretricious relationship' as the courts put it during this time period—created no legal rights or obligations flowed from several different public-policy concerns.").

[18] RESTATEMENT OF CONTRACTS § 589, at 1098 (AM. LAW INST. 1932).

[19] *See, e.g.*, Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005) (striking down Virginia's law criminalizing fornication).

[20] In 2004, the federal General Accounting Office (now known as the Government Accountability Office, or "GAO") issued an updated report identifying 1138 federal statutory provisions that conferred benefits, rights, and privileges based on marital status. U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1-2 (2004), http://www.gao.gov/new.items/d04353r.pdf [https://perma.cc/L9K4-BYMY]; *see also* Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 167 (2015) (contending that marriage offers many benefits, including family-based subsidies). *But see* Erez Aloni, *Deprivation Recognition*, 61 UCLA L. REV. 1276, 1280 (2014) (exploring how legal recognition of relationships can also impose costs).

[21] D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 410 (6th ed.

partners are not entitled to spousal social security benefits in the event of the disability of one of them.[22] Individuals who are in mutually dependent but unmarried relationships are not entitled to take leave under the Family and Medical Leave Act to care for each other.[23] In many states, an unmarried partner who agrees to have a child through assisted reproduction is a legal stranger to the resulting child.[24]

Marital supremacy continues to pervade the civil law despite the fact that about half of all American adults today live outside of marriage.[25] This large and growing slice of the American public is disproportionately nonwhite and lower income.[26] In other words, marriage is becoming a marker of privilege and inequality.[27]

I too am concerned about the legal privileging of marital over nonmarital families. Indeed, much of my prior scholarship urges more equitable treatment of nonmarital families.[28] Marriage equality skeptics are right to be attentive to the possibility that the gay rights canon could negatively affect nonmarital

2016) ("Wrongful death statutes restrict recovery only to legal spouses (although a few state laws permit recovery by a person who is named as a beneficiary in a decedent's will)."); *cf.* Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988) (holding that an unmarried partner could not sue for negligent infliction of emotional distress).

[22] *See* Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 306-08 (2015).

[23] 29 U.S.C. § 2612(a)(1) (2012) (providing grounds for leave); *see also* Updating the Family and Medical Leave Act, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES (June 2016), http://www.nationalpartnership.org/research-library/work-family/fmla/updating-the-fmla.pdf [https://perma.cc/QJ27-CNY6] (arguing that the Family and Medical Leave Act needs to be amended to update the definition of family).

[24] *See* Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1184-89 (2010).

[25] Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805, 806 (2015).

[26] *See, e.g.*, PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 2 (2010), http://pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf [https://perma.cc/W584-LU2N].

[27] *See, e.g.*, JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 1 (2014).

[28] *See, e.g.*, Joslin, *supra* note 20, at 156 (arguing that we must think "more carefully about which family configurations should be entitled to government recognition and support"); Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 496 (2014) (arguing that advocates must make sure that children of nonmarital families "are still adequately protected under the law"); Joslin, *supra* note 25, at 808 (arguing for the adoption of provisions that prohibit discrimination "because one is living in a nonmarital family"); Joslin, *supra* note 24, at 1183-84 (arguing for equal application of rules "to all children born through [assisted reproductive technologies], without regard to the marital status, gender, or sexual orientation of the intended parents").

families both legally and normatively.[29] It is also important, however, not to prematurely shut the door on the possibility that the gay rights canon could hold a more progressive trajectory.[30] This Article reclaims this potential. In so doing, this Article counters the now dominant narrative that *Obergefell* marks a backward step in the struggle to protect nonmarriage.

This Article demonstrates how the gay rights canon can support a broader constitutional right to form families, including but not limited to the marital family.[31] A few clarifications are in order. First, in arguing that the Constitution extends protection to those living outside of marriage, I do not mean to suggest that any time the government extends a particular protection to married people but not to unmarried people such differentiation is unconstitutional. In this Article, I make a more modest claim. In arguing that there is a right to nonmarriage, I mean that at least in some circumstances, the failure to accord any meaningful protection to those living outside of marriage raises a concern of constitutional magnitude. As others have explained, there may be good reasons to treat these groups differently in some respects.[32] But sometimes, these reasons may not be sufficient to justify the harms such rules impose.

Second, I also am not arguing in favor of disestablishing marriage altogether,[33] or in favor of removing the government from the business of families.[34] While current regulation of families is far from perfect, the

[29] Murray, *supra* note 3, at 1210 ("*Obergefell*'s pro-marriage message has constitutional consequences that go beyond the expansion of civil marriage."); *see also* Huntington, *supra* note 3, at 29 ("These sweeping statements about the place of marriage in legitimizing a family are harmful both rhetorically and substantively.").

[30] I am not the only scholar who is suggesting that the Court's recent marriage cases hold more progressive potential. *See, e.g.*, Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 891 (2014) (suggesting that "the conceptions of equal protection and due process [that the marriage decisions] advance are not so easily cabined" and that these principles might be used to challenge "the legality of other forms of discrimination against gays and lesbians"); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1187 (2016) ("[R]ather than affirming traditional norms governing the family, marriage equality and the model of parenthood it signals are transforming parenthood, marriage, and the relationship between them—for all families.").

[31] For consideration of a negative right to be "free from state-imposed marriage," see Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1513 (2016).

[32] *See, e.g.*, June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 115 (2016); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 186-91 (2015).

[33] For scholarship exploring this possibility, see, for example, Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1240 (2010).

[34] *See, e.g.*, Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41, 42 (2015) (exploring whether, post-*Obergefell*, "states [can] look for ways to pull themselves away from endorsing marriage at all").

government has an important role to play in supporting families.[35] Thus, this Article is premised on the claim that there is value in a system of family law. But, importantly, this system needs to include, but not be limited to, marriage. This Article shows how the gay rights canon can support rather than stifle the shift to a broader, more inclusive system that does not limit protection to the marital family.[36]

This Article offers two novel and important contributions to the existing literature. First, this Article synthesizes the Supreme Court's gay rights cases,[37] what I call the "gay rights canon," and identifies three constitutional principles that this canon develops. The gay rights decisions: (1) appreciate the importance of equal liberty, particularly as it relates to families and children; (2) express a deep concern for the protection of dignity and, conversely, against the imposition of stigma; and (3) embrace a dynamic theory of constitutional law.

Second, this Article reconsiders the future of nonmarriage in light of those principles of the gay rights canon that I identify. The last several decades have brought about important changes to the legal and cultural treatment of nonmarriage. Unmarried individuals have a constitutionally protected right to engage in sexual intimacy.[38] Agreements between unmarried partners are no

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[35] I develop these ideas further elsewhere. *See, e.g.*, Joslin, *supra* note 20, at 178-79. For other insightful explorations of the importance of government support for families, see, for example, MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 37-38 (2010); CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 165-202 (2014).

[36] In so doing, this Article seeks to answer the question that Hunter poses but does not answer: "[H]ow far the liberty right will extend to protect intimate relationships other than marriage." Hunter, *supra* note 8, at 114.

[37] In this Article, I consider the Court's gay rights canon to include the following four decisions: *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Other pieces seeking to understand and make sense of the Court's approach to LGBT rights issues have likewise focused on these four cases. *See, e.g.*, Franklin, *supra* note 30, at 817, 871-81 (exploring the "new jurisprudence of gay rights" and examining *Romer*, *Lawrence*, *Windsor*, and *Obergefell*); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 22-23 (2015) (analyzing the Court's "gay-rights triptych" of *Lawrence*, *Windsor*, and *Obergefell*, along with its precursor, *Romer*); Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 147 & n.4 (2015) (analyzing the Court's "gay rights cases" of *Romer*, *Lawrence*, *Windsor*, and *Obergefell*).

I exclude other decisions that involved or related to LGBT people, including *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 559 (1995); *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000); and *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661, 669 (2010).

[38] *See, e.g.*, Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005) (relying on *Lawrence* and

longer considered illicit and unenforceable.[39] Children born to unmarried individuals must be treated equally to children born to married couples.[40] Despite these changes, however, the law continues to privilege marital relationships.[41] When reread consistently with a dynamic constitutional theory that is pro-equal liberty and anti-stigma, the Supreme Court's decision in *Obergefell* can strengthen, rather than foreclose, a constitutional right to nonmarriage.

Mapping the contours of this right to nonmarriage is not a simple endeavor. The right I posit here is in the nature of the gay rights canon. Thus, it does not fit neatly or easily into a conventional equal protection or due process framework. Instead, this right is a contextual and flexible one. The degree of scrutiny triggered by infringements of this right depends on a constellation of considerations, including the importance of the right or harm at issue, as well as the nature of the equality and fairness concerns triggered by the law or practice. Because the standard of scrutiny will depend on the particular claim before the court, some laws that differentiate between the married and the unmarried may raise very significant claims for consideration, and others may be more likely to pass constitutional muster. While an analysis of the exact contours of this right to nonmarriage is beyond the scope of this Article, I close this piece by considering what this right may mean in a few specific contexts.

This Article proceeds in five Parts. Part I chronicles the trajectory towards equality for LGBT people. Part I also describes the pro-LGBT critique of these legal successes. While these decisions advance the cause for LGBT people, some critics argue that they do the opposite for the law of nonmarriage. Part II provides a context for appreciating the concerns of marriage equality skeptics. Marriage was almost universal in the past. By contrast, today about half of American adults are unmarried.[42] The dramatic increase of nonmarriage has not emerged equally across all socioeconomic and racial groups. Instead, marriage is now "a marker of the new class lines remaking American

holding unconstitutional a criminal ban on fornication).

[39] *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 122-23 (Cal. 1976) (holding that upon dissolution of their relationships, unmarried cohabitants can bring claims based on express and implied contract as well as equitable theories). *But see* Blumenthal v. Brewer, 2016 IL 118781, ¶ 73 ("Our decision in *Hewitt* bars [equitable or common law] relief if the claim is not independent from the parties' living in a marriage-like relationship for the reason it contravenes the public policy . . . disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants." (citing Hewitt v. Hewitt, 394 N.E.2d 1204, 1210-11 (Ill. 1979))).

[40] *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) (striking down a law that discriminated against nonmarital children).

[41] *See supra* notes 20-24 (identifying exclusive benefits and privileges conferred on those in marital relationships).

[42] Joslin, *supra* note 25, at 806.

society."[43] A legal regime that privileges marriage over nonmarriage thus further reinforces racial and class divisions. Part III lays the foundation for my alternative, more progressive rereading of the gay rights canon. This rereading offers a counternarrative to the more pessimistic view of the future of nonmarriage offered by marriage equality skeptics. Part III identifies and gives meaning to the core constitutional principles of the gay rights canon. Part IV uses these principles to make the claim for a constitutional right to nonmarriage. Part V begins to map out the scope and substance of this right to nonmarriage.

I. THE GAY RIGHTS TRAJECTORY

Federal constitutional law did not protect gay sex until just over one decade ago. How did the law move so quickly from treating LGBT people as outlaws to treating them as equal citizens? Section I.A tells the conventional narrative through the lens of LGBT equality. These decisions mark incremental steps on a path towards greater protection for LGBT people. Section I.B chronicles and examines claims raised by scholars and activists who support LGBT equality, but who fear the gay rights canon may have negative collateral consequences for other groups, particularly those who live outside of marriage.

A. *Outlaw to Outcast to (Partial)*[44] *Equality*

In 1986, the Supreme Court upheld the constitutionality of sodomy statutes in *Bowers v. Hardwick*.[45] The specific question presented was a narrow one: whether the Constitution permitted the state to criminalize a particular type of sexual conduct.[46] Notwithstanding the narrowness of the question presented, the case came to stand for a much broader principle.[47] *Bowers* was understood

[43] CARBONE & CAHN, *supra* note 27, at 19.

[44] *Obergefell* was an important step towards equality, but there is more work to be done. Same-sex couples can now marry in all fifty states, but lesbian, gay, and bisexual individuals still lack express protection from sexual orientation discrimination in over half the states. *See, e.g.*, *#32Reasons: States That Lack Fully Inclusive Non-Discrimination Protections*, HUM. RTS. CAMPAIGN, http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/31reasons-comprehensive.pdf [https://perma.cc/SRG3-7RDG] (last visited Nov. 11, 2016).

[45] 478 U.S. 186, 195-96 (1986) (holding that a Georgia law banning sodomy had a rational basis premised on the notion of morality), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[46] *Id.* at 190.

[47] Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of* Bowers v. Hardwick—Romer v. Evans*, 116 S. Ct. 1620 (1996)*, 32 HARV. C.R.-C.L. L. REV. 225, 225 (1997) ("Despite *Hardwick*'s narrow holding that there is no fundamental right to homosexual sodomy under the Due Process Clause, lower courts have understood *Hardwick* to stand for the proposition that state-endorsed discrimination against homosexuals is not constitutionally infirm.").

by lower courts and the public as a declaration that lesbian and gay people stood outside the protection of the law.[48] As the U.S. Court of Appeals for the D.C. Circuit explained:

> If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.[49]

In the wake of *Bowers*, lower courts ratified acts of discrimination against lesbian and gay people in a wide range of areas. As Christopher Leslie explained, "the very existence of sodomy laws create[d] a criminal class of gay men and lesbians, who [we]re consequently targeted for violence, harassment, and discrimination because of their criminal status."[50] In the years between *Bowers* and *Lawrence v. Texas*,[51] LGBT parents lost custody of their children,[52] were fired from their jobs,[53] and were made targets of private discrimination solely because of their sexual orientation.[54] Courts upheld these results as consistent with the Constitution. For example, in 1998, the Alabama Supreme Court reinstated a restriction on a lesbian mother's visitation with her own children.[55] The court explained that the restriction was permissible, and indeed necessary, in order to protect the children from their mother's inherent criminality:

> [T]he conduct inherent in lesbianism is illegal in Alabama. [The mother], therefore, is continually engaging in conduct that violates the criminal law of this state. Exposing her children to such a lifestyle, one that is

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[48] *Id.* at 227 (finding that courts after *Bowers* "reasoned that it is constitutional to discriminate against [homosexuals as a] class").

[49] Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

[50] Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 103 (2000).

[51] 539 U.S. 558 (2003).

[52] *See, e.g.*, Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (granting custody to a grandmother over a lesbian mother's objection and noting that "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth; thus, that conduct is another important consideration in determining custody" (citation omitted)).

[53] *See, e.g.*, Shahar v. Bowers, 114 F.3d 1097, 1110 (11th Cir. 1997) (en banc) (upholding termination of a lesbian lawyer on grounds that it was not unreasonable to think that a lesbian employee's choice to have a commitment ceremony was "likely to cause the public to be confused and to question the Law Department's credibility; to interfere with the Law Department's ability to handle certain controversial matters, including enforcing the law against homosexual sodomy; and to endanger working relationships inside the Department").

[54] Joseph Landau, *Ripple Effect*, NEW REPUBLIC, June 23, 2003, at 12; *see also* Leslie, *supra* note 50, at 171.

[55] *Ex parte* D.W.W., 717 So. 2d 793, 796 (Ala. 1998).

> illegal under the laws of this state and immoral in the eyes of most of its citizens, could greatly traumatize them.[56]

In this and other cases, courts understood LGBT people as innately criminal and immoral people.[57] As such, LGBT people deserved the discriminatory treatment to which they were subjected.

In its 1996 decision in *Romer*, the Supreme Court began to chip away at the outlaw status it had imposed.[58] *Romer* involved a challenge to a voter-approved amendment to the Colorado Constitution that precluded any state, city, or local entity from prohibiting discrimination against lesbian, gay, or bisexual people.[59] In striking down Amendment 2, the Supreme Court made clear that lesbian and gay people were not entirely outside of the law's protection.[60] "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government," the *Romer* Court explained, "is itself a denial of equal protection of the laws in the most literal sense."[61] In so concluding, *Romer* "deliver[ed] a significant blow" to the permanent outlaw status that *Bowers* had imposed on LGBT people.[62] At the same time, however, *Romer* seemed to leave *Bowers* in place.[63] With *Bowers* untouched, the extent of the victory remained unclear and tentative.[64]

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[56] *Id.* (citation omitted).

[57] *See supra* notes 50-56; *see also* Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.").

[58] 517 U.S. 620, 631 (1996) (finding that a state constitutional amendment prohibiting legal protections for lesbian, gay, and bisexual people violated the Equal Protection Clause).

[59] *Id.* at 624.

[60] *See* Joslin, *supra* note 47, at 237 ("[A] careful reading of *Romer* reveals that state and lower courts can no longer blindly rely on [*Bowers*] to uphold the proposition that discrimination against homosexuals is constitutionally permissible.").

[61] *Romer*, 517 U.S. at 633.

[62] Joslin, *supra* note 47, at 225.

[63] *See, e.g.*, *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) ("In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago . . . ." (citing Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003))).

[64] *See, e.g.*, Joslin, *supra* note 47, at 239 (noting that "the precedential force" of *Romer* was "unclear"); Jay Michaelson, *On Listening to the* Kulturkampf*, or, How America Overruled* Bowers v. Hardwick*, Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559, 1576 (2000) ("But in strictly legal terms, *Romer v. Evans* did not overrule *Bowers v. Hardwick*. It never mentioned *Bowers*, it did not impliedly or expressly void the statute upheld in *Bowers*, and it was only connected to *Bowers* by a commonality of subject matter.").

LGBT people no longer could be made "stranger[s] to [the] laws,"[65] but it was still permissible to treat them as unequal and less worthy.

Seven years later, the *Lawrence* Court formally broke the *Bowers* stranglehold. "*Bowers*," the *Lawrence* Court declared, "was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[66] In one stroke, the *Lawrence* Court struck down all remaining sodomy statutes, thus bringing an end to LGBT people's outlaw status. But the decision did not stop there. The *Lawrence* Court also declared that LGBT people and their relationships were worthy of dignity. "It suffices for us to acknowledge," the Court explained, "that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[67] This declaration, however, came with a caveat. Lesbian and gay people were entitled to dignity so long as they kept their relationships private and abandoned their demands for public equality.[68]

This forward march continued in *Windsor*, in which the Court struck down Section 3 of the federal Defense of Marriage Act ("DOMA").[69] Section 3 defined marriage for all federal purposes as the union of "one man and one woman."[70] As a result of Section 3, the federal government was required to deny same-sex spouses validly married under state law an estimated 1138 federal rights and responsibilities granted to heterosexual spouses based on their marital status.[71] With *Windsor*, the Court extended at least partial public equality to gay and lesbian relationships.[72] At least where the state had decided to recognize and respect relationships between same-sex couples, it was unconstitutional for Congress to impose a special disability on gay people.[73]

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[65] *Romer*, 517 U.S. at 635.

[66] 539 U.S. at 578.

[67] *Id.* at 567.

[68] *Id.* ("The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.").

[69] 133 S. Ct. 2675, 2695 (2013) ("This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.").

[70] 1 U.S.C. § 7 (2000), *invalidated by Windsor*, 133 S. Ct. at 2695.

[71] Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1471 (2013).

[72] Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 188 (noting that *Windsor*, together with *Romer* and *Lawrence*, made clear that, at least in some circumstances, gay people could no longer be "carve[d] out . . . from legal protection").

[73] *Windsor*, 133 S. Ct. at 2695-96.

The most recent addition to the Court's gay rights canon is, of course, *Obergefell*.[74] The consolidated cases decided in *Obergefell* challenged marriage bans in Michigan, Kentucky, Ohio, and Tennessee.[75] Collectively, the plaintiffs—fourteen same-sex couples and two surviving same-sex spouses[76]—challenged both the laws that prevented them from marrying within their home states and the laws that denied recognition of same-sex marriages validly entered into in other states.[77]

In a groundbreaking opinion, the Supreme Court struck down all remaining marriage bans in the United States.[78] The Court declared: "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[79] Accordingly, "the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."[80]

It is difficult to overstate the impact of the *Obergefell* decision on the lives of LGBT people. The exclusion from marriage caused same-sex couples to be denied a wide range of critical rights and responsibilities.[81] The *Obergefell* Court recounted a few of these tangible harms. The State of Ohio, for example, refused to permit James Obergefell to be listed as the surviving spouse on his deceased husband's death certificate.[82] Plaintiffs April DeBoer and Jayne

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[74] Obergefell v. Hodges, 135 S. Ct. 2584, 2607-08 (2015).

[75] *Id.* at 2593.

[76] *Id.*

[77] *Id.* By way of example, Ohio statutory law provided:

> (1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.
>
> (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

OHIO REV. CODE ANN. § 3101.01(C) (LexisNexis 2015). This statutory provision was reinforced by an amendment to the Ohio Constitution. OHIO CONST. art. XV, § 11 ("Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.").

[78] *Obergefell*, 135 S. Ct. at 2604-05.

[79] *Id.* at 2604.

[80] *Id.* at 2605.

[81] *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) ("The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death.").

[82] *Obergefell*, 135 S. Ct. at 2594.

Rowse were denied the right to adopt one another's legally adopted children.[83] Other state-conferred rights denied to same-sex couples included:

> taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.[84]

And, as the Court noted: "Valid marriage under state law is also a significant status for over a thousand provisions of federal law."[85]

State laws barring same-sex marriages also conveyed the message that the government viewed those relationships as inferior. "[E]xclusion from [marriage]," the Court declared, "has the effect of teaching that gays and lesbians are unequal in important respects"[86] and "serves to disrespect and subordinate them."[87] As Justice Kennedy previously explained in *Lawrence*, this type of official government mark is an "invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[88] For this reason as well, marriage bans could not survive constitutional review.

The trajectory from *Bowers* to *Obergefell* is nothing short of remarkable. Fifteen years ago, gay people in some states could be imprisoned for engaging in adult, consensual sexual intimacy. Today, lesbian and gay people not only can live without constant fear of criminal prosecution, but can also seek equal treatment and equal dignity for themselves and their families.[89] These victories are surely to be celebrated.

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[83] *Id.* at 2595. As Nancy Polikoff persuasively argues, rather than challenging the marriage ban, the parties could have challenged the state limitation on joint adoptions to married couples. *See* Nancy Polikoff, *It's the Children, Stupid! . . . Or Why Ryanne, Nolan, and Jacob Still Don't Have Two Legal Parents*, BEYOND (STRAIGHT & GAY) MARRIAGE (Nov. 7, 2014), http://beyondstraightandgaymarriage.blogspot.com/2014/11/its-children-stupid-or-why-ryanne-nolan.html [https://perma.cc/LY4E-X4RX] ("But my beef remains with the couple's lawyers, who allowed the case to be hijacked in that direction without simultaneously demanding a ruling on the *separate* claim that categorical refusal to grant a second-parent adoption petition when in a child's best interests violated the rights of both the parents and the children."). Many states do allow unmarried partners to jointly adopt children. *See, e.g.*, COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 5:2 (2016-2017 ed. 2016).

[84] *Obergefell*, 135 S. Ct. at 2601.

[85] *Id.*

[86] *Id.* at 2602.

[87] *Id.* at 2604.

[88] Lawrence v. Texas, 539 U.S. 558, 575 (2003).

[89] For consideration of what *Obergefell* may mean for transgender people, see Scott Skinner-Thompson, *How* Obergefell *Could Help Transgender Rights*, SLATE: OUTWARD (June 26, 2015, 2:26 PM), http://www.slate.com/blogs/outward/2015/06/26/

B. *Rebellion to Domestication*

Among scholars who support LGBT equality, however, there is a growing group that raises concerns about how these victories were achieved and how they may impact the law going forward. Some marriage equality skeptics raised these warnings even before the Supreme Court entered the conversation. Almost twenty-five years ago, LGBT rights activist Paula Ettelbrick denounced the nascent movement for equal marriage rights.[90] Winning the right to marry, Ettelbrick warned, would mean sacrificing core goals of the LGBT rights movement:

> The moment we argue, as some amongst us insist on doing, that we should be treated as equals because we are really just like married couples and hold the same values to be true, we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices.[91]

The concern was that marriage equality would domesticate what had been a radical, pro-sex community. "[I]nstead of liberating gay sex and sexuality," Ettelbrick explained, marriage equality "would further outlaw all gay and lesbian sex that is not performed in a marital context."[92] As such, the quest would contradict core goals of the movement.

Since Ettelbrick published her article in 1989, the Court has issued the four opinions in the gay rights canon. In those intervening years, other scholars have argued that Ettelbrick's predictions did indeed come to pass. Shortly after the Supreme Court struck down all remaining sodomy statutes in *Lawrence*,[93] Katherine Franke raised a similar alarm bell. Although she celebrated the removal of criminal penalties for consensual sexual intimacy, Franke warned about the domesticating potential of *Lawrence*.[94] "I fear," Franke wrote, "that *Lawrence* and the gay rights organizing that has taken place in and around it have created a path dependency that privileges privatized and domesticated

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obergefell_and_trans_rights_the_supreme_court_s_endorsement_of_identity.html [https://perma.cc/8WMK-FY6Q].

[90] Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Autumn 1989, *reprinted in* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 370, 370 (3d ed. 2011) ("Marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships.").

[91] *Id.*

[92] *Id.*

[93] Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

[94] Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1411 (2004) ("Decriminalization of sodomy is no small thing, and I do not seek to minimize the significance of this aspect of *Lawrence*. Rather, my concern is with what the decision in *Lawrence* opens up and shuts down for nonnormative sexual identities—where does it take us next and what arguments are enabled and foreclosed by *Lawrence*'s reasoning?").

rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality."[95]

Franke is not alone. For years, Nancy Polikoff expressed similar concerns. In her groundbreaking book *Beyond (Straight and Gay) Marriage*, Polikoff argued that the marriage equality movement was leaving a significant and important group behind—those living outside of marriage.[96] Even if marriage equality were achieved, Polikoff explained, this large and growing slice of the American public would "still be without those supports that every family deserves."[97]

These more general fears about the domestication of gay relationships became more specific in the wake of *Windsor*. Some argued that in striking down a form of discrimination against lesbian and gay people, *Windsor* entrenched another form of discrimination—discrimination against the unmarried. "In recognizing the injury that DOMA wrought by treating same-sex marriages as second-tier marriages," Widiss argues, "the *Windsor* opinion embraces a traditional understanding of marriage as superior to all other family forms."[98] Douglas NeJaime makes a similar point:

> Accordingly, as scholars have long warned, marriage equality may come at a price. To obtain tangible rights and benefits, couples may have to marry. To receive respect for their sexual relationships, couples may have to marry. To communicate the strength of their commitment to their children, couples may have to marry.[99]

The *Obergefell* decision, issued in June 2015, opened the floodgates. Since that time there has been an outpouring of scholarship raising similar concerns. Catherine Powell writes: "The problem with *Obergefell*, however, is that in the majority opinion, Justice Kennedy's adulation for the dignity of marriage risks undermining the dignity of the individual, whether in marriage or not."[100] Clare Huntington laments that *Obergefell* "reifies marriage as a key element in the

[95] *Id.* at 1414; *see also id.* at 1409 ("The price of the victory in *Lawrence* has been to trade sexuality for domesticity—a high price indeed, and a difficult spot from which to build a politics of sexuality.").

[96] *See generally* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008).

[97] *Id.* at 8.

[98] Widiss, *supra* note 5, at 553.

[99] NeJaime, *supra* note 5, at 247 (footnotes omitted). In a more recent article, however, NeJaime offers a more hopeful vision of the future. NeJaime, *supra* note 30, at 1190 ("[M]arriage equality can facilitate the expansion of intentional and functional parentage principles across family law—not only inside but also outside marriage, for both same-sex and different-sex couples.").

[100] Powell, *supra* note 3, at 69-70 (footnote omitted).

social front of family, further marginalizing nonmarital families."[101] Others offer similar critiques.[102]

As these scholars aptly note, there *is* reason to fear that *Obergefell* might entrench marriage's supremacy. There is no way around it; the *Obergefell* decision is filled with language not only glorifying marital relationships, but also denigrating nonmarital relationships.[103] Marriage, the Court declares, "embodies the highest ideals of . . . family."[104] It confers "nobility and dignity" upon the spouses.[105] It "is essential to our most profound hopes and aspirations."[106] This ideal(ized) family form is contrasted with life outside of marriage, which is portrayed as a "dismal" situation.[107] Adults living outside of marriage are condemned to loneliness.[108] Their children are not only humiliated,[109] they are harmed by living in what the Court implies is an inferior family form.[110]

This rhetoric in *Obergefell* suggesting the superiority of marriage and marital relationships comes in the wake of decades of halting progress for those living outside of marriage. Starting in the 1960s and 1970s,[111] the Supreme Court "asserted some measure of constitutional protection for life outside of marriage and nonmarital families."[112] Critics argue that the marriage equality cases arrested this positive progress in the law of nonmarriage. For example, Murray writes that *Obergefell* "preempts the possibility of relationship and family pluralism in favor of a constitutional landscape in which marriage exists alone as the constitutionally protected option for family

[101] Huntington, *supra* note 3, at 23.

[102] *See, e.g.*, Hunter, *supra* note 8, at 111 ("But the logic of the [*Obergefell*] opinion raises the obvious question of how much dignity should attach to individuals who choose not to marry."); Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 126 CALIF. L. REV. CIR. 126, 134 (2015) ("The extension of marriage rights to same-sex couples reinforces and entrenches the legal privileging of marriage at the expense of individuals and families who cannot, or do not wish to, marry.").

[103] *See* Mayeri, *supra* note 102, at 135 ("Kennedy's opinion elevates and ennobles marriage in terms that implicitly disparage nonmarriage.").

[104] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[105] *Id.* at 2594.

[106] *Id.*

[107] Murray, *supra* note 3, at 1215.

[108] *Obergefell*, 135 S. Ct. at 2600 ("Marriage responds to the universal fear that a lonely person might call out only to find no one there."); *id.* at 2608 ("Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions.").

[109] *Id.* at 2600-01.

[110] *Id.* at 2600 ("Marriage also affords the permanency and stability important to children's best interests.").

[111] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (holding that unmarried adults have a right to access contraception); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 176 (1972) (striking down a law that discriminated against nonmarital children).

[112] Murray, *supra* note 3, at 1211.

and relationship formation."[113] Indeed, some even suggest that the marriage equality decisions may even result in a reversal of that past progress.[114]

I agree that protection for nonmarriage is important. I disagree, however, with the claim that the gay rights canon necessarily sets back the movement for nonmarriage rights. In the Parts that follow, I chart out a more progressive vision of the future of family law. But first, Part II lays out why this debate matters.

II. NONMARRIAGE TODAY

The legal treatment of nonmarital families is an issue of critical importance. The number of Americans living in nonmarital families continues to increase. About half the U.S. adult population lives either alone or in nonmarital adult relationships.[115] Thus, *Obergefell*'s denigration of nonmarriage and nonmarital families is deeply concerning.

Historically, nonmarital relationships were strongly discouraged through harsh civil and criminal laws.[116] Indeed, through the 1970s, many states criminalized sex outside of marriage, as well as living together outside of marriage.[117] These laws also communicated and reinforced strong social stigma associated with nonmarriage.

Today, many of the criminal penalties associated with nonmarital relationships have fallen away.[118] It is legal to have sex outside of marriage, and cohabitation is no longer criminalized, or, if it is, the laws are no longer enforceable.[119] Greater availability of birth control and contraception also make nonmarriage more attractive.

These legal developments contributed to a dramatic increase in the number of individuals living in nonmarital families. From 1970 to 2000, "U.S.

[113] *Id.*

[114] *See, e.g.*, Carpenter & Cohen, *supra* note 10, at 124 ("Much to the dismay of those who may have wished to allow states to experiment with other, more progressive relationship-recognition forms, *Obergefell*'s marital superiority rhetoric may guarantee that marriage will, for the foreseeable future, remain the only recognized relationship in town.").

[115] D'VERA COHN ET AL., PEW RESEARCH CTR., BARELY HALF OF U.S. ADULTS ARE MARRIED—A RECORD LOW (2011), http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf [https://perma.cc/8Y33-FAQY] (stating that fifty-one percent of adults in 2010 were married as compared to seventy-two percent of adults in 1960).

[116] BOWMAN, *supra* note 16, at 12.

[117] *Id.* at 15 ("[M]any states still had statutes against both fornication and/or cohabitation as late as 1978 . . . .").

[118] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down remaining laws criminalizing consensual, private, adult, noncommercial sexual intimacy).

[119] *Id.*; *see also* Hobbs v. Smith, No. 05 CVS 267, 2006 WL 3103008, at *1 (N.C. Super. Ct. Aug. 25, 2006) (relying on *Lawrence* and holding unconstitutional a criminal ban on fornication and cohabitation); Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005).

unmarried-cohabitant households rose almost ten-fold" from 523,000 to nearly 4.9 million.[120] The trend has only increased since then. By 2010, there were almost 8 million cohabiting couples in the United States.[121] According to the U.S. Census Bureau, the "unmarried partner population . . . grew 41 percent between 2000 and 2010."[122]

Social scientists offer a number of theories to explain the rise in the number of cohabiting households. One theory relates to changing legal and social norms regarding cohabitation. It is no longer a crime to live together outside of marriage.[123] As the law has changed, so have the social mores related to cohabitation. Today, there is less social stigma associated with living in a nonmarital family.[124] Accordingly, people today feel freer to live in nonmarital relationships. Some scholars suggest that growing class inequality in America is also part of the equation.[125] "For blue-collar men, pathways into the labor market have become constricted and the availability and stability of work have declined, which, in turn, has affected the number of men who are seen as good marriage prospects."[126]

Whatever the reason, it is clear that increasing numbers of Americans are living outside of marriage. Despite this reality, civil law continues to draw a distinction between the treatment of marital and nonmarital families. Nonmarital partners are denied a vast range of rights and benefits that are automatically extended to married spouses.[127] For example, in most states

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[120] Garrison, *supra* note 17, at 313.

[121] DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, at 1 (2012), http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf [https://perma.cc/BY8K-3WGM].

[122] *Id.*; *see also* Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 53 (2015).

[123] Although some states still have laws criminalizing cohabitation, these statutes are unconstitutional. *See, e.g.*, *Hobbs*, 2006 WL 3103008, at *1 (relying on *Lawrence* to hold unconstitutional state anti-fornication and anti-cohabitation laws).

[124] *See, e.g.*, Shelly Lundberg & Robert A. Pollak, *The Evolving Role of Marriage: 1950-2010*, 25 FUTURE CHILDREN 29, 31 (2015) ("Changes in social norms have also played a role: the stigmas associated with nonmarital sex, cohabitation, nonmarital fertility, and divorce have declined dramatically.").

[125] *See, e.g.*, CARBONE & CAHN, *supra* note 27, at 50 ("We argue . . . that the missing mechanism is inequality, and we explain how inequality has skewed marriage markets.").

[126] *Id.* at 75; *see also* Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 FUTURE CHILDREN 117, 118 (2005) ("The economic barriers that, at least in theory, affect the marriage rates of the poor include low earnings and employment among unskilled men, increasing employment among unskilled women, and the welfare state, which imposes a significant 'tax' on marriage for low-income populations.").

[127] EVAN WOLFSON, WHY MARRIAGE MATTERS 194 (2005); *see also* Joslin, *supra* note 20, at 167-68.

nonmarital partners do not share the assets accumulated during their relationship,[128] and they lack the right to sue for wrongful death and loss of consortium.[129] All unmarried partners are excluded from spousal social security benefits.[130] Thus, as Serena Mayeri explains, "[d]espite a transformative half century of social change, marital status still matters."[131]

In addition, while the stigma associated with nonmarital cohabitation has surely decreased, it has not disappeared altogether.[132] Recent studies find that a significant share of the American public disapproves of nonmarital cohabitation. For example, a 2014 Gallup poll found that one-third of respondents stated that having sex outside of marriage was not morally acceptable.[133] An even larger percentage of the American public thinks that it is bad for children to be raised by unmarried mothers: forty-two percent of respondents stated that having children outside of marriage was not morally acceptable.[134]

The tangible and stigmatic harms of marital supremacy are not felt equally across socioeconomic and demographic groups. Whether one is married or not is increasingly influenced by race, wealth, and education.[135] The millions of

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[128] Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1400 (2001) ("Most state courts have agreed with the California Supreme Court's conclusion in *Marvin* that marital or community property laws do not apply to nonmarital partners. Therefore, an unmarried cohabitant does not have the type of claim to a share of the other partner's earnings that a spouse could make in a divorce proceeding. As some courts put this point, cohabitation alone does not give rise to a presumption of shared property rights." (italics added) (footnote omitted)); *see also* POLIKOFF, *supra* note 96, at 89 (noting that only the State of Washington follows the American Law Institute Principles regarding equal property distribution for unmarried cohabitants).

[129] *See, e.g.*, Estin, *supra* note 128, at 1403 (discussing California law); POLIKOFF, *supra* note 96, at 89 ("A few states allowed the survivor of an unmarried heterosexual relationship to sue for the loss of the relationship or for the emotional harm of witnesses a partner's death.").

[130] Nancy D. Polikoff, *Valuing All Families: An Introduction to the 2008 Santa Clara Law Review Symposium*, 48 SANTA CLARA L. REV. 741, 746 (2008) ("A woman married to a retired worker for nine months is entitled to social security benefits based on his life-long earnings when he dies; a woman who lived with an unmarried partner for twenty-nine years, even if she raised children with him, is not eligible." (footnote omitted)).

[131] Mayeri, *supra* note 15, at 1279.

[132] *See, e.g.*, Joslin, *supra* note 25, at 824-25 ("[B]ias against [nonmarital] families has not disappeared.").

[133] Rebecca Riffkin, *New Record Highs in Moral Acceptability*, GALLUP (May 30, 2014), http://www.gallup.com/poll/170789/new-record-highs-moral-acceptability.aspx [https://perma.cc/NX5Z-KHKS]; *see also* PEW RESEARCH CTR., MORALITY INTERACTIVE TOPLINE RESULTS: SPRING 2013 AND WINTER 2013-2014 SURVEYS 9 (2014) (reporting that thirty percent of Americans find sex between unmarried adults to be morally unacceptable).

[134] *See* Riffkin, *supra* note 133.

[135] Mayeri, *supra* note 15, at 1279.

U.S. adults living in nonmarital families are disproportionately likely to be lower income, to have lower education levels, and to be nonwhite.[136] "Marriage . . . has emerged as a marker of the new class lines remaking American society."[137] Stable marriages "have become a hallmark of privilege."[138]

The rhetoric in *Obergefell* ennobling marriage and denigrating nonmarriage surely could compound rather than alleviate the challenges faced by those living outside of marriage. *Obergefell* and *Windsor* glorify a family structure that is increasingly associated with the most privileged segment of our society.[139] The decisions also denigrate a family structure that is increasingly associated with the more marginalized and vulnerable sectors of our population.[140] The sentiments expressed in these opinions could be used to justify the hundreds of laws that continue to distinguish between marital and nonmarital couples.[141] Moreover, *Obergefell* could reaffirm popular belief that nonmarital relationships are inferior and undesirable. The language could also be read to confirm the narrative that nonmarriage is harmful for children.[142] Marriage, the Court in *Obergefell* suggests, "serves 'children's best interests.'"[143]

III. *OBERGEFELL*'S PROGRESSIVE POTENTIAL

It is important, however, not to prematurely foreclose the possibility of a more progressive future for nonmarriage. It is possible to read the gay rights

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[136] *See* June Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage?*, 45 U.S.F. L. REV. 313, 324-25 (2010) ("The cumulative result of these [demographic and economic] changes is that family form has become a marker of class and culture. . . . For the poorest Americans, concentrated in urban centers, marriage has effectively disappeared."); Huntington, *supra* note 32, at 187-91 (discussing demographic statistics regarding unmarried parents); Courtney G. Joslin & Lawrence C. Levine, *The Restatement of Gay(?)*, 79 BROOK. L. REV. 621, 639 (2014) ("Although it was not true historically, today, reliance on formal family status has profound racial and class implications.").

[137] CARBONE & CAHN, *supra* note 27, at 19.

[138] *Id.*

[139] *See* June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1190 ("In today's system, married two-parent families have become a marker of privilege, characterizing a disproportionately better-educated and wealthier upper third of the country."); Widiss, *supra* note 5, at 550 ("[L]ifelong marriage is now common only among a relatively affluent, highly educated, and disproportionately white sliver of the population.").

[140] *See, e.g.*, Carbone, *supra* note 136, at 324-25; Joslin, *supra* note 25, at 806.

[141] *See supra* notes 127-30 and accompanying text.

[142] *See, e.g.*, PEW RESEARCH CTR., *supra* note 26, at 8 (finding that forty-three percent of respondents believed that "more unmarried couples raising children is bad for society").

[143] Murray, *supra* note 3, at 1213 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015)).

canon in a way that supports a robust claim that nonmarriage deserves constitutional protection. To be sure, this is not the only possible or even the most likely trajectory for these cases in the years to come. The more dire predictions of marriage equality skeptics may well come to pass. But that is not the only route courts might take. It is too soon to cast the gay rights canon as an instrument of marital supremacy. Section III.A identifies the principles of the gay rights canon. Section III.B then uses these principles to offer a more progressive reading of *Obergefell*, one that supports rather than forecloses a claim that the denial of meaningful protection to those living outside of marriage is constitutionally impermissible.

A. *Principles of the Gay Rights Canon*

Many scholars lament the lack of doctrinal clarity in the gay rights canon.[144] In every case, Justice Kennedy sidestepped the opportunity to expressly clarify the level of constitutional scrutiny that applies to sexual orientation discrimination.[145] Moreover, Justice Kennedy failed to clearly identify the scope and nature of the liberty interests at stake in the cases.[146] Despite the lack

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[144] *See, e.g.*, Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103, 1103 (2004) ("The Supreme Court's decision in *Lawrence v. Texas* is easy to read, but difficult to pin down." (footnote omitted)). For more positive readings of the gay rights canon, see generally Tribe, *supra* note 37; Yoshino, *supra* note 37.

[145] *See* Andrew Koppelman, *Beyond Levels of Scrutiny:* Windsor *and "Bare Desire to Harm*,*"* 64 CASE W. RES. L. REV. 1045, 1046 (2014) ("It is a truth universally acknowledged that the big question the Supreme Court evaded in *United States v. Windsor* . . . is this: what is the appropriate level of scrutiny for classifications based on sexual orientation?" (footnote omitted)).

To be clear, however, while Justice Kennedy does not expressly declare what level of constitutional scrutiny must be applied to sexual orientation-based classifications, scholars and lower courts persuasively argue that the gay rights cases did in fact apply some form of heightened scrutiny. *See, e.g.*, SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 483 (9th Cir. 2014) (relying on *Windsor* to conclude that heightened scrutiny must be applied to sexual orientation classifications); Autumn L. Bernhardt, *The Profound and Intimate Power of the* Obergefell *Decision: Equal Dignity as a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 22-23 (2016) (noting that the *Obergefell* decision discussed the four factors "that courts generally consider when examining the suspect status of a group").

[146] *See, e.g.*, Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. (forthcoming July 2017) (manuscript at 2) (on file with author) (noting that scholars have criticized *Lawrence* and *Windsor* "as failing to specify with adequate precision the constitutional right at stake"). *But cf.* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (arguing that *Lawrence* demonstrates how "certain fundamental facets of freedom have won fierce protection under our Constitution even when they have defied easy labeling and enumeration or one-dimensional characterization in terms of such primary human activities as 'speech' or 'assembly' or 'bearing arms'").

of doctrinal clarity of the gay rights canon,[147] three important constitutional themes or principles can be traced through these decisions. In all four opinions, the Court expresses: (1) an appreciation for the connection or synergy between the principles of liberty and equality;[148] (2) a deep concern for the equal dignity of all persons and, similarly, for the imposition of stigma upon a disfavored group;[149] and (3) an understanding of constitutional law as a dynamic doctrine that evolves to reflect legal, cultural, and social change.[150] In the discussion that follows, I locate these principles in the gay rights canon and give substance to their meaning and application.

1. Equal Liberty

First, all four gay rights opinions rely on an interrelationship between the principles of liberty and equality. Laurence Tribe previously described this interrelationship as a double helix.[151] More recently, Tribe referred to this as the "equal dignity" principle.[152] Kenji Yoshino refers to this relationship as a "hybrid structure."[153] Pamela Karlan describes the approach as a

[147] Numerous scholars have commented on the lack of doctrinal clarity in these cases. *See, e.g.*, Hunter, *supra* note 144, at 1103; Courtney G. Joslin, Windsor*, Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 157 (2013) ("As is true of Justice Kennedy's prior gay rights decisions, the opinion in *Windsor* does not neatly fit into any previously established analytical scheme." (footnote omitted)); Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 VA. L. REV. ONLINE 29, 31 (2013) ("The particular constitutional guarantee in *Windsor* is hard to identify amidst the various rationales.").

[148] *Obergefell*, 135 S. Ct. at 2603.

[149] Cary Franklin refers to this as an "anti-stereotyping doctrine." Franklin, *supra* note 30, at 827.

[150] To be clear, I do not mean to suggest that these basic themes arise *only* in the context of the gay rights canon. Indeed, as Ashutosh Bhagwat explains, these themes actually run through many of Justice Kennedy's opinions. Bhagwat, *supra* note 6, 384-87 (examining how principles of liberty and dignity, and the connection between the two, flow through the opinions of Justice Kennedy across a range of substantive contexts); *see also id.* at 388 ("I have thus far argued that the defining aspect of [Justice Kennedy's] constitutional jurisprudence has been a commitment to all forms of liberty, which he sees as a means to protect human dignity. He has, I have argued, hewed to that position across time, and across many different areas of law.").

[151] Tribe, *supra* note 146, at 1898; *see also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 779 (2011) ("It is no accident, then, that Tribe used [*Lawrence*] as his starting point to discuss the 'double helix' of liberty and equality as a dignity-based claim.").

[152] Tribe, *supra* note 37, at 17 ("I argue that *Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity* . . . .").

[153] Yoshino, *supra* note 151, at 779; *see also* Franklin, *supra* note 30, at 818-19 ("The interrelationship between due process and equal protection has played an especially

"stereoscopic" one—a constitutional approach that looks at the claim "through the lenses of both the due process clause and the equal protection clause" at the same time.[154] Justice Kennedy himself uses the word "synergy."[155] However one describes it, it is clear that the gay rights decisions reflect an understanding of and an appreciation for the interrelationship between equal protection and due process. For example, in *Lawrence*, the Court explained: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects."[156] The Court was even more explicit about the interactive nature of due process and equal protection principles in *Obergefell*:[157]

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.[158]

This fusion between principles of equality and liberty is important. According to Yoshino, this hybrid or synergistic equality and liberty paradigm "stresses the interests we have in common as human beings rather than the demographic differences that drive us apart. In this sense, the shift from the 'old' to the 'new' equal protection could be seen as a movement from group-based civil rights to universal human rights."[159] As Nan Hunter points out, melding principles of equality (what one might traditionally think of as equal protection) with principles of liberty (what one might traditionally think of as due process protection) produces a doctrine that "seems more holistic and connected to social experience and practice than likely would have been the

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prominent role in the adjudication of gay rights cases . . . . The Court acknowledged the intertwined nature of due process and equal protection quite explicitly in *Lawrence v. Texas*, and again last year in *United States v. Windsor*." (footnote omitted)).

[154] Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002).

[155] Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015). Over a decade ago, Hunter used this word to describe the Court's approach in the gay rights cases. Hunter, *supra* note 144, at 1134 ("The Court [in *Lawrence*] recognized the synergy between the two doctrines, but did not attempt to draw broader ramifications from it. However, an appreciation of the mutual reinforcement of equality and liberty principles has been gradually increasing for some time in the Court's constitutional jurisprudence." (footnote omitted)).

[156] Lawrence v. Texas, 539 U.S. 558, 575 (2003); *see also* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.").

[157] *See, e.g.*, Yoshino, *supra* note 37, at 171 (describing the "synthesis of liberty and equality" in the *Obergefell* decision).

[158] *Obergefell*, 135 S. Ct. at 2602-03.

[159] Yoshino, *supra* note 151, at 793.

case if the Court had separated its analyses of substantive due process and equal protection into distinct segments."[160]

Because this due process/equal protection synergy or equal dignity principle is more holistic and less formalistic, it can enable courts to see constitutional violations that might otherwise escape detection.[161] Indeed, Justice Kennedy made a similar point in *Obergefell*:

> Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[162]

Especially when evaluating long-standing, deeply rooted institutions or practices, using this double-helix lens can better help courts, and in turn society, see the unfairness that has long been invisible in those systems. As Justice Kennedy explained in *Obergefell*, viewing liberty claims through the lens of equal protection "can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[163] In her concurring opinion in *Lawrence*, Justice O'Connor expressed a similar perspective. She stated that courts have found it easier to identify a constitutional violation when a law simultaneously infringes an important liberty interest *and* unfairly targets a group.[164]

Moreover, not only does this intertwined or hybrid lens help one see inequality more clearly, but thinking about due process and equal protection principles collectively can also give one a greater appreciation for the extent of the harm at issue.[165] This, indeed, was part of the error of the court in *Bowers*

[160] Hunter, *supra* note 144, at 1134.

[161] *See, e.g.*, Abrams & Garrett, *supra* note 146 (manuscript at 29) ("For example, in fundamental rights equal protection cases, the added equal protection claim may help the judge to 'see' animus . . . ."); Franklin, *supra* note 30, at 818 ("Due Process and equal protection often work in tandem to illuminate important aspects of constitutional questions that can be seen less clearly through the lens of a single clause.").

[162] *Obergefell*, 135 S. Ct. at 2603.

[163] *Id.*

[164] Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause. We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.").

[165] *See, e.g.*, Abrams & Garrett, *supra* note 146 (manuscript at 26) ("[D]iscrimination can be categorically worse when the discrimination is over a government benefit that is of real social and practical importance . . . .").

v. Hardwick.[166] The *Bowers* Court saw the harm imposed by sodomy statutes through too narrow a lens.[167] The *Lawrence* Court, by contrast, appropriately and accurately grasped that sodomy statutes not only criminalized a range of conduct, but simultaneously marked members of a vulnerable class as outcasts.[168] Indeed, this was the real problem with the law at issue in *Lawrence*.[169]

Finally, a hybrid or stereoscopic principle of equal liberty may capture claims that would escape detection or remedy under a siloed (or what Karlan calls a "monocular"[170]) equal protection or due process analysis. This is true because the harm imposed by the denial of a particular right may not appear to be as great if one is not simultaneously taking into account the fact that it is only one particular group of people who are being denied that right. But when one considers both factors at the same time—that something important is being denied, *and* that it is only being denied to an identified group—the harm may be "magnif[ied]."[171] That is, in some cases, the collective harm may be greater than the sum of its parts.

2. Dignity and Stigma

Second, all four opinions demonstrate a deep appreciation for the importance of the equal dignity of all persons[172] and a concern about the imposition of stigma upon disfavored groups.[173] The principle of equal

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[166] 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[167] *Lawrence*, 539 U.S. at 567 ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.").

[168] *Id.* ("The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."); *see also id.* at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

[169] Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1453 (2004) ("The real problems with prohibitions on same-sex intimacy, then, come from the collateral consequences of such laws . . . .").

[170] Karlan, *supra* note 154, at 492.

[171] Abrams & Garrett, *supra* note 146 (manuscript at 5-6); *see also id.* (manuscript at 26) ("[D]iscrimination can be categorically worse when the discrimination is over a government benefit that is of real social and practical importance . . . .").

[172] Tribe, *supra* note 146, at 1898 ("The 'liberty' of which the Court spoke was as much about equal dignity and respect as it was about freedom of action—more so, in fact.").

[173] NeJaime, *supra* note 5, at 246 ("With dignity as a core attribute of marital recognition—and, conversely, with stigma as the constitutive element of non-recognition—the expressive elements of marriage seem at their apex in *Windsor*."); *see also Chapter*

protection invoked and relied upon in the gay rights canon is not one premised solely on a notion of formal equal treatment. It is of a more basic, and at the same time more transcendent, nature.[174] The decisions are grounded in the principle that all persons are entitled to a basic level of dignity. Conversely, rules that are erected to strip individuals of dignity and to impose stigma violate this principle. Thus, in the gay rights cases, the Court was able to avoid explicitly adopting a particular level of scrutiny by concluding that the laws failed this threshold test.[175] DOMA, the Court declared in *Windsor*, was an example of such a law:

> DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency . . . . [DOMA] places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . .[176]

Four: Animus and Sexual Regulation, 127 HARV. L. REV. 1767, 1771 (2014) ("*Lawrence*'s focus on the sodomy law's demeaning, condemnatory, and stigmatizing effects was, in one sense, a continuation of the constitutional principle developed in *Romer* and in the earlier anti-animus cases: the Constitution is inimical to legislative actions that demean or denigrate a class of persons by imposing concrete burdens or vulnerabilities upon that class."); Marc R. Poirier, *"Whiffs of Federalism" in* United States v. Windsor*: Power, Localism, and* Kulturkampf, 85 U. COLO. L. REV. 935, 967 (2014) ("Read carefully, the *Windsor* opinion is replete with references to local interaction implicating dignity and respect, or their opposites, inferiority and humiliation."). *See generally* Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3, 5-6 (2015) (exploring the role that dignity and stigma play in *Obergefell*).

[174] As Shannon Minter explains: "*Obergefell* presents a . . . radical departure from the Court's increasingly narrow conception of equal protection." Shannon Minter, New Dimensions of Freedom: How the Supreme Court Ruling on Marriage Equality Revitalized Our Constitution, Remarks at California State University, Sacramento (Sept. 17, 2015) (transcript on file with author).

[175] *See, e.g.*, Peter Nicolas, *Gayffirmative Action: The Constitutionality of Sexual Orientation-Based Affirmative Action Policies*, 92 WASH. U. L. REV. 733, 762-63 (2015) ("While *Romer*, *Lawrence*, and *Windsor* each delivered victories to the gay-rights plaintiffs, the decisions suffer from the limitations Justice Marshall identified in his separate opinion in *Cleburne*. Specifically, the murkiness of the decisions has left lower courts 'in the dark,' and while this has resulted in some victories for proponents of gay rights, the Court's failure to clearly state in any of these decisions that heightened scrutiny is in play has resulted in some lower courts invoking traditional rational basis principles to reject equal protection claims brought by gays and lesbians.").

[176] United States v. Windsor, 133 S. Ct. 2675, 2694 (2013); *see also id.* at 2693 ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence."); *id.* at 2693-94 ("The Act's demonstrated purpose is to ensure that if any State

Colorado's Amendment 2 suffered from the same flaw. As the Court explained in *Romer*: "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."[177]

The sodomy law at issue in *Lawrence* suffered from the same defect. Indeed, the constitutional principle of stigma avoidance was so important that the Court in *Lawrence* held that all remaining sodomy statutes needed to be struck down, not just those laws that targeted same-sex sexual intimacy. This was true, the Court explained, because *all* sodomy statutes—however drawn—had the effect of stigmatizing and demeaning same-sex relationships:

> If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.[178]

These two concepts—ensuring equal dignity and avoiding stigma—help identify constitutional violations. This is true because the denial of equal dignity and the imposition of stigma can "contribute[] in key ways to the constitutional violation."[179] In *Lawrence*, for example, the principal constitutional vice of Texas's sodomy ban was not its criminalization of a

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decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment."); *id.* at 2695-96 ("DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

[177] Romer v. Evans, 517 U.S. 620, 635 (1996); *see also id.* ("It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.").

[178] Lawrence v. Texas, 539 U.S. 558, 575 (2003); *see also id.* at 578 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

[179] NeJaime, *supra* note 5, at 240; *see also id.* at 246 ("[The] separate status itself, regardless of the denial of material benefits, seemed to produce an injury with constitutional implications.").

certain type of sexual intimacy, but rather "its stigmatization of intimate personal relationships between people of the same sex."[180] Indeed, Karlan argues this was the true harm imposed by the statute. As she argues, "the fact that states ma[d]e virtually no effort to enforce criminal prohibitions on private gay sexual activity" made it clear that the "real problems with prohibitions on same-sex intimacy" were the "collateral consequences of such laws."[181] These laws sent the message that the lives of gay people were "unworthy of respect."[182]

Concerns regarding dignity and stigma feature prominently in the gay rights cases. The application of these principles, however, is not limited to that context. Rather, the Court's invocation of the principles in the gay rights canon is trans-substantive. That is, the gay rights canon suggests that these are core principles that apply to *all* individuals;[183] these principles of dignity and stigma represent a constitutional floor below which the state cannot drop. For example, in *Brown v. Plata*,[184] which involved the lack of medical care for prisoners, the Court relied on this core concept of basic dignity.[185] The *Plata* Court declared that although "prisoners may be deprived of rights that are fundamental to liberty," they still "retain the essence of human dignity inherent in all persons."[186]

3. Dynamic Constitutionalism

Finally, all four opinions embrace a theory that views the Constitution as a dynamic doctrine that evolves to reflect legal, cultural, and social developments. As Justice Kennedy himself said in the closing paragraph of *Lawrence*:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution

[180] Tribe, *supra* note 146, at 1902-04.

[181] Karlan, *supra* note 169, at 1453.

[182] *Id.*

[183] Tribe, *supra* note 37, at 22 ("That notion—the idea that *all individuals* are deserving in equal measure of personal autonomy and freedom to 'define [their] own concept of existence' instead of having their identity and social role defined by the state—has animated Justice Kennedy's most memorable decisions about the fundamental rights protected by the Constitution . . . ." (footnote omitted)).

[184] 563 U.S. 493 (2011).

[185] *Id.* at 510 (holding that California's failure to provide basic medical and mental health care was "incompatible with the concept of human dignity and has no place in civilized society").

[186] *Id.* I thank Shannon Minter for this point.

endures, persons in every generation can invoke its principles in their own search for greater freedom.[187]

Similarly, in *Obergefell*, the Court explained that while history and tradition are important constitutional guideposts, "rights come not from ancient sources alone."[188] "They rise, too," the Court continued, "from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[189] As Tribe explains, in some prior cases, the Court used history and tradition in a rigid way as a means of limiting constitutional protection.[190] The gay rights cases, in contrast, look to history and tradition in a more holistic and dynamic way. These cases emphasize the importance of looking to developments and changes in history and traditions to guide the expansion and evolving understanding of constitutional protections.[191] Tribe observes that the gay rights cases rely on history and tradition "as reflections of a deeper pattern involving the allocation of decisionmaking roles, not always fully understood at the time each precedent was added to the array."[192]

B. *Historical Roots of the Principles*

As discussed above, the gay rights canon rests on three core constitutional principles. The cases are based on an embrace of equal liberty; a deep concern for protecting dignity and avoiding stigma; and a dynamic theory of constitutional interpretation. None of these principles is unprecedented. Rather, individually each principle has deep roots in the Court's jurisprudence.

1. Equal Liberty

Although it is often overlooked, one can find many other cases that involve a "hybrid" or double helix equal protection/due process analysis.[193] As Tribe explains, "[t]he *Lawrence* Court's blend of equal protection and substantive

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[187] Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

[188] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

[189] *Id.*

[190] *See* Tribe, *supra* note 146, at 1897 ("[C]ourts . . . identify a set of personal activities in which individuals may engage free of government regulation. This list derives from American constitutional text and tradition, fixed, if not at the nation's founding, then, at the very latest, at the time of the post-Civil War constitutional upheaval . . . .").

[191] *See, e.g.*, *Lawrence*, 539 U.S. at 572-75 (documenting an "emerging awareness" that sodomy laws were unjust).

[192] Tribe, *supra* note 146, at 1899.

[193] Scholars, likewise, have argued in favor of such an approach. *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482 n.5 (2004) ("[R]eferences to equal protection analysis encompass review under both the Fourteenth Amendment's Equal Protection Clause and the equality guarantee incorporated into the Due Process Clause of the Fifth Amendment."); Joslin, *supra* note 47, at 236-43 (arguing that the *Romer* Court's intertwined equal protection and due process analysis is "more candid in its purpose and mode of reasoning").

due process themes was neither unprecedented nor accidental."[194] *Loving v. Virginia*[195] is one such case. The concluding paragraph of the Court's opinion in *Loving* suggested that it was the combination of the due process and equal protection concerns that gave rise to the constitutional violation in that case. "To deny this fundamental freedom," the *Loving* Court declared, "on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."[196] Indeed, the concepts of fundamental rights and impermissible classifications were so intertwined with one another in *Loving* that, initially, many commentators were not sure the extent to which the decision established that marriage was a fundamental right for purposes of the Due Process Clause. The editors of the *Harvard Law Review*, for example, wrote in 1980: "the *Loving* opinion stopped short of a clear statement of a right to marry, for the reasoning depended largely on the racial character of the classification."[197] Moreover, *Zablocki v. Redhail*[198]—the case now credited with clarifying that the right to marry derives from the Due Process Clause,[199] regardless of whether a racial classification is involved—was actually decided under the Equal Protection Clause.[200]

Cases fusing the concepts of equal protection and due process can also be found in other areas of law. *Eisenstadt v. Baird*,[201] a key access to contraception case, was decided on equal protection grounds.[202] Even *Roe v. Wade*,[203] which was decided on due process grounds, was undergirded by an appreciation for the particular harms abortion laws inflict on women.[204] Tribe

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[194] Tribe, *supra* note 146, at 1902.

[195] 388 U.S. 1, 12 (1967) (striking down a Virginia statute prohibiting interracial marriages as a violation of the Fourteenth Amendment).

[196] *Id.* The doctrinal blurring continues in the next two sentences of the opinion: "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.*

[197] *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1249 (1980) [hereinafter *The Constitution and the Family*].

[198] 434 U.S. 374 (1978).

[199] *See, e.g.*, *The Constitution and the Family*, *supra* note 197, at 1250 ("Not until 1978 did the Supreme Court unequivocally state that the right to marry is fundamental.")

[200] *Zablocki*, 434 U.S. at 377.

[201] 405 U.S. 438 (1972).

[202] *Id.* at 443 ("And we hold that the statute, viewed as a prohibition on contraception *per se*, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.").

[203] 410 U.S. 113 (1973).

[204] *Id.* at 153. The Court unpacked the harms involved:

notes that these hybrid cases go even farther back. Citing *Meyer v. Nebraska*[205] and *Pierce v. Society of Sisters*,[206] among other cases, Tribe declares that "the more closely one looks at the principal cases dealing with rights surrounding reproduction . . . , parenting . . . , marriage . . . , family . . . , and intimate association outside marriage . . . , the more one sees equal protection and substantive due process as regularly interlocking and powerfully complementary sources of protection."[207] Thus, although a framework that fuses the doctrines of equal protection and due process may seem unorthodox to some, a more careful review of Supreme Court jurisprudence reveals that this approach has a long and deep history.

Indeed, some Justices urged the Court to expressly adopt this type of hybrid or more fluid framework that simultaneously considers both the class-based aspects of the challenged legislation and the effect of the legislation on the class. For example, in *San Antonio Independent School District v. Rodriguez*,[208] Justice Marshall proffered such an approach.[209] The framework urged by Justice Marshall neither adhered to rigid tiers of scrutiny, nor to rigid boundaries between due process and equal protection analyses:

> I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization.[210]

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Id.

[205] 262 U.S. 390, 400-03 (1923) (finding that a Nebraska statute prohibiting German language instruction in state schools violated the Fourteenth Amendment).

[206] 268 U.S. 510, 534-35 (1925) (striking down a statute that prevented enrollment in private and parochial schools because it "interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control").

[207] Tribe, *supra* note 146, at 1902-03 n.32.

[208] 411 U.S. 1 (1973).

[209] *Id.* at 98-99 (Marshall, J., dissenting).

[210] *Id.* at 98 (citations omitted).

This flexible approach, Justice Marshall continued, should explicitly take into account not only the classification at issue, but also the importance of the liberty interest at stake.[211]

Scholars also call for this type of more holistic constitutional analysis.[212] Karlan, for example, advocates in favor of what she calls a "stereoscopic" analysis.[213] A stereoscopic analysis, she explains, requires courts to consider the claim "through the lenses of both the due process clause and the equal protection clause."[214] This stereoscopic analysis, she argues, "can have synergistic effects, producing results that neither clause might reach by itself."[215] Karlan also asserts, consistent with Tribe, that the Court has indeed done just this in many prior cases.[216] Similarly, Hunter argues that "where the Court has confronted claims of not-quite-deprivation of liberty, as experienced by persons in not-quite-suspect classes, it has in practice displayed a willingness to take into account a kind of cross-doctrinal cumulative weighting of the interests involved and the consequences of adverse legal treatment."[217]

The Court's willingness to consider "cumulative constitutional rights"[218] has not been limited to cases raising equal protection and due process claims. As Kerry Abrams and Brandon Garrett meticulously document, the Court has

[211] *Id.* at 98-99 (referencing "the constitutional and societal importance of the interest adversely affected"). Justice Marshall not only believed this was the correct analysis, but he also believed it reflected what the Court had actually done in prior cases. *Id.* at 99 ("I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which 'concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.'" (quoting Dandridge v. Williams, 397 U.S. 471, 520-21 (1970))); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 460 (1985) (Marshall, J., concurring in part and dissenting in part) ("I have long believed the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'" (quoting *Rodriguez*, 411 U.S. at 99)); Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring) (calling for a rejection of "a rigidified approach to equal protection analysis"); Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause.").

[212] *See, e.g.*, Goldberg, *supra* note 193, at 519-21 (discussing the more fluid analyses urged by Justice Marshall and Justice Stevens).

[213] Karlan, *supra* note 154, at 474.

[214] *Id.*

[215] *Id.*

[216] Karlan cites *Harper v. State Board of Elections*, 383 U.S. 663 (1966), and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), as examples. Karlan, *supra* note 154, at 477.

[217] Hunter, *supra* note 144, at 1135.

[218] I borrow this phrase from Kerry Abrams and Brandon Garrett. Abrams & Garrett, *supra* note 146 (manuscript at 1).

relied on what they call "cumulative constitutional rights" in a large number of cases across a wide range of subject matters. As they explain, these "cumulative constitutional rights cases are everywhere."[219] Once properly identified, it is clear that cumulative constitutional rights analysis is not anomalous; rather, it is part of a long and deep constitutional tradition.

2. Dignity and Stigma

Likewise, neither dignity nor stigma is a new consideration for the Court.[220] The Court has considered the concept of dignity in a range of cases over the years.[221] Dignity plays a visible role in the abortion rights cases, for example. In his concurring and dissenting opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[222] Justice Stevens highlighted the concept of dignity, stating: "The authority to make such traumatic and yet empowering decisions [to terminate a pregnancy] is an element of basic human dignity."[223] This decision, Justice Stevens continued, affects a woman's life and destiny.[224] And a woman should have the right, autonomy, and authority to make that life altering decision, at least within certain parameters. The concept of dignity is especially poignant for Justice Kennedy.[225] Indeed, "[f]or nearly twenty-five years [in a wide range of cases], Justice Kennedy has been pushing 'dignity' closer to the center of American constitutional law and discourse."[226]

References to stigma date back years as well. As Kenneth Karst explains, "ever since the time (more than a hundred years ago) when the Supreme Court gave substantive due process its first applications, egalitarian values—

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[219] *Id.*; *see also* Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1070 (2016) ("The Court, that is, has sometimes *combined constitutional clauses*, deriving an overall conclusion of constitutional validity (or invalidity) from the joint decisional force of two or more constitutional provisions."); *id.* at 1072 (noting that the piece "demonstrates as a *doctrinal* matter that combination analysis enjoys a stronger foothold in Supreme Court case law than has generally been suggested").

[220] Tribe, *supra* note 37, at 23 ("[T]he conception of equal dignity in fact has a considerable doctrinal pedigree, one stretching across some of the most high-profile cases decided by the Court in the past half-century.").

[221] Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 210-11 (2011).

[222] 505 U.S. 833, 916 (1992) (Stevens, J., concurring in part and dissenting in part).

[223] *Id.*

[224] *Id.* ("A woman considering abortion faces 'a difficult choice having serious and personal consequences of major importance to her own future . . . .'" (quoting Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 781 (1986))).

[225] To be clear, invocations of dignity need not always point in a progressive direction. *See, e.g.*, Yuvraj Joshi, *The Respectable Dignity of* Obergefell v. Hodges, 6 CALIF. L. REV. CIR. 117, 120, 121 (2015) (arguing that *Obergefell* transformed what had been a right to choose, even if the choice was one that "a large segment of American society would condemn," into a right to make "a specific choice that embodies the norm").

[226] Tribe, *supra* note 37, at 21.

including concerns about respect and stigma—repeatedly have provided the background for such decisions, and sometimes have taken center stage."[227] Stigma played an important role in some of the Court's early race discrimination cases. In *Brown v. Board of Education*,[228] for example, the Court held that segregated schools were unconstitutional.[229] In reaching this conclusion, the Court relied in part on the message that government-imposed segregation sent to black children. "To separate them from others of similar age and qualifications," the Court declared, "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[230]

Similarly, in striking down laws that discriminated against "illegitimate" children,[231] the Court relied on concerns about stigma and moral condemnation. In *Weber v. Aetna Casualty & Surety Co.*,[232] the Court struck down a Louisiana workers' compensation scheme.[233] The scheme relegated illegitimate children to a lesser status of "other dependents" who were not entitled to recover unless there were benefits remaining after the more "worthy" dependents recovered.[234] Not only did the law unfairly deny benefits to a group of children, it also unjustly marked those children with a heavy stigma. The Court concluded that visiting society's "condemnation on the head of an infant is illogical and unjust."[235]

[227] Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 101 (2007).

[228] 347 U.S. 483 (1954).

[229] *Id.* at 495 ("[S]egregation [in public education] is a denial of the equal protection of the laws.").

[230] *Id.* at 494; *see also id.* ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." (quoting Findings of Fact at ¶ 8, Brown v. Bd. of Educ., 98 F. Supp. 797 (D. Kan. 1951))).

[231] For a comprehensive discussion of illegitimacy and stigma, see Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 363 (2011).

[232] 406 U.S. 164 (1972).

[233] *Id.* at 165.

[234] *Id.* at 168 ("Unacknowledged illegitimate children, however, are relegated to the lesser status of 'other dependents' under § 1232(8) of the workmen's compensation statute and may recover *only* if there are not enough surviving dependents in the preceding classifications to exhaust the maximum allowable benefits." (footnote omitted)).

[235] *Id.* at 175.

3. Dynamic Constitutionalism

The theory that constitutional rights are dynamic and evolving also has a long lineage. Of course, not every Justice embraces this view. But one need only look at the earlier fundamental rights cases to see that some members of the Court view the Constitution as a dynamic document that evolves with changing social and legal understandings. In his seminal dissenting opinion in *Poe v. Ullman*,[236] for example, Justice Harlan noted that due process principles are shaped not only by "what history teaches are the traditions from which it developed," but also from "the traditions from which it broke."[237] "[T]radition," he continued, "is a living thing."[238]

Other members of the Court have likewise rejected a static understanding of the Constitution. Justice Brennan eloquently articulated a dynamic theory of constitutional interpretation in his dissent in *Michael H. v. Gerald D.*[239] Writing for a plurality in *Michael H.*, Justice Scalia described fundamental rights as limited to those rights that had been protected in the past.[240] According to Justice Scalia, to establish that an interest is entitled to protection under the Due Process Clause, one must show that the interest is "deeply embedded within our traditions."[241]

In response, Justice Brennan declared: "'[L]iberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . .'"[242] The rigid, historically limited principles announced by the plurality were "unfamiliar" to Justice Brennan.[243] The document described by the plurality, he continued,

> is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives

[236] 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). In his recent essay, Kenji Yoshino argues that Justice Kennedy's opinion in *Obergefell* draws heavily on this very dissent. Yoshino, *supra* note 37, at 169 ("In short, we seem to be back in the world of Justice Harlan's *Poe* dissent, in which substantive due process is not reducible to any formula, but is left instead to a common law methodology.").

[237] *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

[238] *Id.*

[239] 491 U.S. 110, 140 (1989) (Brennan, J., dissenting) (arguing in favor of "limiting the role of 'tradition' in interpreting the Constitution's deliberately capacious language").

[240] *Id.* at 124-26 (plurality opinion).

[241] *Id.* at 125.

[242] *Id.* at 138 (Brennan, J., dissenting) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571 (1972)).

[243] *Id.* at 141.

> its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.[244]

Justice Douglas expressed a similar understanding in his opinion for the Court in *Harper v. Virginia Board of Elections*.[245] In that case, which involved a challenge to a poll tax, he wrote:

> In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.[246]

Thus, while the Court has not always applied the principle consistently, there are many opinions that recognize and rely on the concept of the Constitution as a living document.

4. The Power of the Principles

In sum, the principles of the gay rights canon are not unprecedented. Rather, they have a long and deep history in the Court's jurisprudence. That said, the gay rights canon brings these principles together in a new and powerful way. The three principles animate and give life to each other. The synergistic principle of equal liberty provides a lens to help courts determine what constitutes unfair stigma, as opposed to fair and appropriate differentiation. Evaluating long-standing institutions and rules in light of evolving changes in law and culture likewise helps courts identify systems that impermissibly deny vulnerable groups important liberty interests.

Taken together, the principles of the gay rights canon open up progressive possibilities. The gay rights decisions rely on more dynamic and less rigid concepts of due process and equal protection. In the gay rights canon, the Court appears unfettered (or at least less fettered) by rigid categories and distinctions.[247] Instead, the Court considers constitutional claims in a more

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[244] *Id.* Pamela Karlan points out that even Justices who subscribe to an originalist theory of constitutional interpretation often do not limit themselves to what the original drafters thought particular provisions meant. Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. DAVIS L. REV. 385, 399 (2009) (noting that Justice Scalia wrote "at least two major opinions for the Supreme Court in which he has argued for interpreting constitutional rights in a more expansive way"); *see also* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (interpreting the Second Amendment to strike down a prohibition on handguns in the home); Kyllo v. United States, 533 U.S. 27, 33-40 (2001) (interpreting the Fourth Amendment to hold unlawful the use of thermal-imaging devices to conduct warrantless searches).

[245] 383 U.S. 663, 669 (1966) ("[T]he Equal Protection Clause is not shackled to the political theory of a particular era.").

[246] *Id.* (citation omitted).

[247] Franklin, *supra* note 30, at 826 ("What unites [the gay rights] cases is not the level of

holistic and universal way, and always with an eye towards furthering the underlying principle of equal dignity for all persons. Because the gay rights canon shifts away from rigid categories, this approach frees the Court in future cases from the limits of traditional frameworks that recognize only a limited set of harms, and a limited set of groups. This is true in part because this more fluid approach employed in the gay rights canon not only looks to the specific interest at issue, but also simultaneously appreciates the harm caused by the selective denial of that interest to an identifiable group.[248] This approach allows for the possibility of seeing new harms, including harms caused by long-standing and deeply rooted traditions and practices.[249]

For example, using a monoscopic lens to consider equal protection and due process claims, the Court has refused to recognize education or educational disparities as raising cognizable constitutional concerns.[250] But, if the question of equal access to education is viewed through these principles, the answer might be different. The principles of the gay rights canon teach that courts should consider the equality and the liberty concerns raised by a government law or practice in a synergistic way. That is, one should not ask simply whether education, writ large, is a fundamental right. The question instead should be grounded in the particular case before the court; the court must examine and consider not just what right is being infringed, but also who is denied that right and what the effects of the denial are on that group, particularly with respect to its effect on equality. In the context of education

scrutiny, but the new conception of equality and the substantive constitutional principle on which they rest.").

[248] Yoshino, *supra* note 37, at 174 ("While the path forward for substantive due process will now rely on a common law-based analysis rooted in the *Poe* dissent, one of the major inputs into any such analysis will be the impact of granting or denying such liberties to historically subordinated groups.").

[249] Tribe, *supra* note 146, at 1955 ("[*Lawrence*'s] unmistakable heart is an understanding that liberty is centered in equal respect and dignity for both conventional and unconventional human relationships. *Lawrence* made explicit what was latent in decisions like *Roe* and *Casey* and resurrected what was ignored and confused in decisions like [*Washington v.*] *Glucksberg* and, of course, *Bowers*. After *Lawrence*, it can no longer be claimed that substantive due process turns on an ad hoc naming game focused on identifying discrete and essentially unconnected individual rights corresponding to the private activities our legal system has traditionally valued (or at least tolerated). What is truly 'fundamental' in substantive due process, *Lawrence* tells us, is not the *set of specific acts* that have been found to merit constitutional protection, but rather the *relationships* and *self-governing commitments* out of which those acts arise—the network of human connection over time that makes genuine freedom possible.").

[250] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973); *see also* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 112 (2004) ("In numerous decisions, involving many different kinds of claims, the Supreme Court has professed almost unlimited deference to school officials and has refused to apply the Constitution in schools.").

specifically, what we know is that the educational disparities often raise very serious race and class concerns.[251] As Linda Darling-Hammond writes, "the U.S. educational system is one of the most unequal in the industrialized world, and students routinely receive dramatically different learning opportunities based on their social status."[252]

If faithfully applied, the principles of the gay rights canon hold great progressive potential. In the Parts that follow, I elaborate on how these principles hold great potential for those living outside of marriage.

IV. THE CASE FOR NONMARRIAGE

Obergefell was an important victory for LGBT people and those who support LGBT rights. A growing number of scholars, however, argue that *Obergefell* represents a backward step for the large and growing segment of our population living outside of marriage.[253] For example, Murray writes that "*Obergefell*, with its pro-marriage rhetoric, preempts the possibility of relationship and family pluralism in favor of a constitutional landscape in which marriage exists alone as the constitutionally protected option for family and relationship formation."[254] Murray is not alone in raising these concerns.[255] I share the concerns raised by Murray and others about the future legal treatment of those living in nonmarriage. Their predictions about the trajectory of the law may indeed be right. But it is too soon to declare defeat.

In this Part, I offer a more progressive rereading of *Obergefell*. When read consistently with the principles of the gay rights canon, *Obergefell* supports, rather than forecloses, the claim that the denial of meaningful protection to those living outside of marriage raises a serious constitutional question. To be

[251] *Cf.* Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 975 (2016) ("Coalesced within the right to education's immunity-claim-right structure, substantive due process and equal protection together could offset their respective limitations and ameliorate the right's enforcement standards to synchronize the protection of children's liberty and equality interests.").

[252] Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, 16 BROOKINGS REV. 28, 28 (1998); *see also* EMMA GARCIA & ELAINE WEISS, ECON. POLICY INST., EARLY EDUCATION GAPS BY SOCIAL CLASS AND RACE START U.S. CHILDREN OUT ON UNEQUAL FOOTING 2 (2015), http://www.epi.org/files/2015/Inequality-Starting-Gate-Summary-of-Findings.pdf [https://perma.cc/X9W3-UUPG] ("As is true of odds of school and life success among Americans today, social class is the single factor with the most influence on how ready to learn a child is when she first walks through the school's kindergarten door. Low social class puts children far behind from the start. Race and ethnicity compound that disadvantage, largely due to factors also related to social class.").

[253] *See, e.g.*, Murray, *supra* note 3, at 1210 ("Although the *Obergefell* decision is a victory for same-sex couples that wish to marry, it is likely to have negative repercussions for those—gay or straight—who, by choice or by circumstance, live their lives outside of marriage.").

[254] *Id.* at 1211.

[255] *See supra* note 3.

sure, in positing this more progressive reading of *Obergefell*, I do not mean to suggest that all differential treatment of married and unmarried people is likely unconstitutional. Rather, the right I sketch out in this piece is a contextual one. Unlike traditional "fundamental rights," the standard of scrutiny that must be applied will depend on a holistic assessment of the claim presented. Thus, as Part V explains, some rules that treat married people differently from unmarried people may be permissible under this analysis, while others may fail to pass constitutional muster.

A. *Reading* Obergefell

In *Obergefell*, the Court considered whether marriage laws excluding same-sex couples were unconstitutional. To assess whether the existing fundamental right to marry included the right to marry someone of the same sex,[256] Justice Kennedy considered *why* marriage is a protected institution.[257]

To answer that question, Justice Kennedy identified four essential attributes of marriage. First, marriage is protected under the Due Process Clause because it is closely, indeed, inherently connected to "the concept of individual autonomy."[258] The choice to marry, "[l]ike choices concerning contraception,

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[256] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) ("This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.").

[257] *Id.* ("[I]n assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected."). Justice Kennedy's opinion in *Obergefell* is not the first judicial opinion to seek to determine *why* marriage has been accorded special constitutional protection. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 422-29 (Cal. 2008). That said, many other same-sex marriage opinions, even those that ruled for the plaintiffs on substantive due process/right-to-marry grounds, did not seek to ask, much less answer, this fundamental question. Instead, many of the other decisions simply declared that, just as the right to enter into a different-sex marriage is a fundamental right, so is the right to enter into a same-sex marriage. *See, e.g.*, Bostic v. Schaefer, 760 F.3d 352, 377 (4th Cir. 2014) ("*Lawrence* and *Windsor* indicate that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships. We therefore have no reason to suspect that the Supreme Court would accord the choice to marry someone of the same sex any less respect than the choice to marry an opposite-sex individual who is of a different race, owes child support, or is imprisoned. Accordingly, we decline the Proponents' invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry."). For earlier scholarly engagement with this question, see, for example, Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626-52 (1980), and *The Constitution and the Family*, *supra* note 197, at 1198-248 (analyzing "the state objectives that have been asserted in the family context in an attempt to develop broad principles to clarify constitutional adjudication when conflicts arise between the individual, the family, and the state").

[258] *Obergefell*, 135 S. Ct. at 2599.

family relationships, procreation, and childrearing . . . [is] among the most intimate that an individual can make."[259] It is a choice that "shape[s] an individual's destiny."[260] The Due Process Clause extends protection to these types of decisions. Second, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."[261] Third, marriage is protected because it "safeguards children and families and thus draws meaning from related [existing, due process] rights of childrearing, procreation, and education."[262] Marriage offers families and, importantly, any children to the marriage "recognition, stability, and predictability."[263] Fourth, marriage is protected because it is a "keystone of our social order"; it is a "building block of our national community."[264] Because the marital family performs important civic functions by helping parents raise their children and by helping spouses care for each other, society in turn "support[s] the couple."[265]

Justice Kennedy concluded that same-sex couples could equally fulfill these four essential attributes of marriage. This conclusion, moreover, was bolstered by the equal protection concerns that would be raised if the right to marry did not include the right to marry someone of the same sex.[266] As Justice Kennedy explained: "[E]xclusion from [marriage] has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society."[267]

B. *Rereading* Obergefell *Through the Lens of Nonmarriage*

To be sure, in *Obergefell*, Justice Kennedy was not thinking about protection for nonmarriage. His focus was clear: Justice Kennedy sought to determine why *marriage* is constitutionally protected. But once one identifies the reasons why the right to marry has been long protected, it opens up the space to press the inquiry further: If other family forms also fulfill these same basic attributes, are they too entitled to some level of constitutional protection? When considered in light of the core principles of the gay rights canon, the answer to this question may be "yes."

[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.* at 2600.
[263] *Id.*
[264] *Id.* at 2601.
[265] *Id.*
[266] *See id.* at 2601-02.
[267] *Id.* at 2602.

1. Individual Autonomy

As is true for many married individuals, many unmarried individuals' nonmarital families shape their identities and their destinies. For some, the decision to form and remain in a nonmarital family form is among the "most intimate" decisions he or she has made.[268] Forty years ago, Justice Marshall recognized that this was true for many nonmarital family members: "The choice of household companions . . . involves deeply personal considerations . . . ."[269]

Many individuals in nonmarital families engage in other important, constitutionally protected liberties within that family structure. These liberties may include the right to access contraception[270] and the right to engage in consensual adult sexual intimacy.[271] A significant percentage of individuals in nonmarital families also exercise their constitutionally protected rights to have[272] and to raise children.[273] Approximately forty percent of all children born in this country are born to unmarried women.[274] In some communities, the percentage of children born to unmarried women is much higher.[275] For example, in 2013, 71.4% of all children born to African American women were nonmarital.[276]

For some, the decision to be in a nonmarital family form may also be connected to their rights of expression,[277] or to their religion or spirituality.

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[268] *Cf. id.* ("The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.").

[269] Village of Belle Terre v. Boraas, 416 U.S. 1, 16 (1974) (Marshall, J., dissenting).

[270] Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (holding that single persons may not be denied access to contraception).

[271] Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

[272] *See, e.g.*, *Eisenstadt*, 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

[273] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion) (noting, in a case involving a nonmarital parent, that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court").

[274] *See* Huntington, *supra* note 32, at 168-69 ("Nearly 41% of all children are born to unmarried parents, with even higher levels in some demographic groups.").

[275] Brady E. Hamilton et al., *Births: Preliminary Data for 2013*, 63 NAT'L VITAL STAT. SYS. 1, 14 tbl.6 (2014).

[276] *Id.*

[277] *See* David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 928 (2001) (describing marriage as "a unique symbolic or expressive resource"); Karst, *supra* note 257, at 655-59 (describing the freedom of intimate association in First Amendment terms).

Living outside of marriage is a deliberate choice for some people, one that is intended to express a message about the institution of marriage. Prior to nationwide marriage equality, some different-sex couples chose not to marry as a means of expressing their opposition to the exclusion of same-sex couples. In 2009, Brad Pitt, speaking about his relationship with Angelina Jolie, told Parade Magazine: "Maybe we'll get married when it's legal for everyone else."[278] This message was heard and understood by others. Pitt reported that he "took a lot of flak for saying it—hate mail from religious groups."[279] Others choose not to marry to express a belief that the institution oppresses women. In the early 1970s, for example, "many heterosexual feminists chose not to marry in order to make a statement against marriage, which they believed to be an oppressive, patriarchal institution."[280] Thus, the decision to enter into a nonmarital relationship often touches upon other protected liberty interests.

Looking at these basic reasons through the lens of the gay rights canon strengthens the conclusion that there may be important constitutional issues at stake when laws penalize those living outside of marriage. Classifications based on marital status—at least with regard to adults—trigger only rational basis review under a traditional, monoscopic equal protection analysis.[281] And various individual benefits—like the right to sue for wrongful death or to bring a claim for negligent infliction of emotional distress—may not be considered "fundamental rights" under a traditional, monoscopic due process analysis.

But the gay rights canon relies on a constitutional theory that eschews siloed equal protection and due process analyses.[282] Instead, the gay rights canon teaches that equality and liberty harms may need to be viewed synergistically or stereoscopically.[283] Even if the right in question, say the right to sue for wrongful death, may not be considered a "fundamental right," the denial of that right might sound in the constitutional register when considered in light of the equality concerns that a selective denial of that right raises. As noted above, stable marriages are increasingly limited to the elite. Marriage is disappearing for people who have less than a high school degree, who live below the poverty line, or who are nonwhite.[284] Thus, extending the right to sue for wrongful death to those who are married, but refusing to extend it to a nonmarital partner, raises serious class and race concerns.

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[278] Dotson Rader, *Inside the Private World of Brad Pitt*, PARADE MAG., Aug. 9, 2009, at 4, 6.

[279] *Id.*

[280] Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage*,*"* 79 VA. L. REV. 1535, 1536 (1993).

[281] *See, e.g.*, Nicolas, *supra* note 175, at 768-69 ("[N]on-suspect classifications . . . such as . . . marital status . . . are only subject to rational basis review.").

[282] *See supra* Section IV.A.

[283] *See supra* Section III.B.4.

[284] CARBONE & CAHN, *supra* note 27, at 6-7.

The rule at issue may not only cause significant, tangible harms to individuals and their families, but it may also "serve[] to disrespect and subordinate them."[285] Laws privileging marital relationships over nonmarital ones may send a message that nonmarriage is inferior and less worthy.[286] Even today, some marriage-based rules are intended to send this very message. A poignant recent example is the Illinois Supreme Court's decision in *Blumenthal v. Brewer*.[287] In that case, the Illinois Supreme Court held that unmarried cohabitants are barred from asserting common law claims that otherwise are available to all people, including other unmarried people.[288] Such a rule, the court concluded, was necessary in order to "disfavor[] the grant of mutually enforceable property rights to knowingly unmarried cohabitants" and to "uphold the institution of marriage."[289] "Especially against a long history of disapproval of [nonmarital] relationships, this [kind of] denial . . . works a grave and continuing harm."[290]

Under a traditional, more ossified constitutional framework, these tangible and stigmatic harms may go unaddressed. But a more dynamic theory of constitutional analysis may enable courts to more fully appreciate these claims. Our marriage-based system was designed for a time when most people married. For most of our history, sexual intimacy outside of marriage was a criminal act.[291] Under such a regime, it may have been permissible to discourage nonmarital cohabitation through civil rules as well. But today the law recognizes that adults have a constitutionally protected right to engage in adult, consensual, nonmarital sexual intimacy without the threat of criminal prosecution.[292] It is also now clear that unmarried people have a right to have children and to form nonmarital families.[293] As a result of these changes, many

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[285] Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

[286] For rich discussions of the long history of stigma attached to nonmarital families, see generally Maldonado, *supra* note 231; Mayeri, *supra* note 15.

[287] 2016 IL 118781, ¶¶ 83-87.

[288] *Id.*

[289] *Id.* at ¶¶ 79, 81.

[290] *Obergefell*, 135 S. Ct. at 2604. To be sure, there is a long history of disapproval of nonmarital families. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) ("Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise." (footnote omitted)); *see also* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 6-7 (1971) ("It also is obvious, however, that the traditional status of the illegitimate child does not rest on a fair and impartial adjustment of the conflicting interests involved, but springs from ancient prejudice formed by religious and moral taboos that are losing their weight.").

[291] *See, e.g.*, BOWMAN, *supra* note 16, at 12-20 (tracking the history of criminalization of nonmarital sexual relations).

[292] Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

[293] *See supra* notes 272-73 and accompanying text.

more people today live outside of marriage.[294] Moreover, the people who feel the brunt of the harms imposed by our marriage-based system are people of color and poor people.

In light of these legal and demographic changes, application of these long-standing civil rules raises serious concerns that sound in the constitutional register. A synergistic, anti-stigma, dynamic theory of equal liberty provides a framework that allows courts to appreciate the significance of such claims, and to see constitutional violations that were previously invisible.

2. Safeguarding Children and Families

For the moment, I will skip over the second element Justice Kennedy identified in *Obergefell* and move to the third element regarding the need to "safeguard[] children and families."[295] Historically, most caretaking occurred in the marital family (at least for those families who could marry).[296] But today, marriage is no longer the sole or overwhelmingly predominant site of the raising of children and the provision of care.[297] Many children are born to unmarried women and a significant percentage of these children—twenty-five percent of all children born today[298]—are born to unmarried women living in cohabitating relationships. The reality is that marriage has been joined by other family forms.

The millions of nonmarital families raising children and caring for other family members have the same needs as marital ones for "recognition, stability, and predictability."[299] Just as it is true for those in marital families, relationship instability contributes to worse outcomes for children.[300] Indeed,

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[294] PEW RESEARCH CTR., *supra* note 26, at 21 (noting that in 2008 only fifty-two percent of American adults were married and that many of them were cohabitating).

[295] *Obergefell*, 135 S. Ct. at 2600.

[296] Slaves were precluded from marrying. *See, e.g.*, Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 252 (1999) ("Antebellum social rules and laws considered enslaved people morally and legally unfit to marry. They were incapacitated from entering into civil contracts, of which marriage was one, and were regarded as lacking the moral fiber necessary to respect and honor the sanctity of the marital vows."). For a fascinating and more in-depth account of marriage regulation in the reconstruction era, see generally KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY (2015).

[297] CHILD TRENDS DATABANK, BIRTHS TO UNMARRIED WOMEN: INDICATORS ON CHILDREN AND YOUTH 3 (2015), https://www.childtrends.org/wp-content/uploads/2015/03/75_Births_to_Unmarried_Women.pdf [https://perma.cc/32LZ-QXGY].

[298] Alysse ElHage, *For Kids, Parental Cohabitation and Marriage Are Not Interchangeable*, FAMILY STUDIES (May 7, 2015), http://family-studies.org/for-kids-parental-cohabitation-and-marriage-are-not-interchangeable [https://perma.cc/WPF3-GNW7].

[299] *Obergefell*, 135 S. Ct. at 2600.

[300] Huntington, *supra* note 32, at 198; *see also* Sara S. McLanahan & Irwin Garfinkel,

the Court long ago recognized that the needs of those in nonmarital families are similar to those in marital families. Almost half a century ago, the Court explained in *Weber* that "the dependency and natural affinity of . . . unacknowledged illegitimate children for their father were as great as those of . . . legitimate children."[301] In light of this recognition, the Court held in a range of cases that it is constitutionally impermissible to deny critical rights and protections to nonmarital children.[302]

Some may resist the claim that nonmarital adult relationships are entitled to constitutional protection. These adults, some may argue, could marry. Because they have the choice to marry and, in turn, to access marital benefits, the denial of benefits to those who do not make that choice raises no constitutional concerns.

While it is true that most families now have the theoretical "choice" to marry, the availability of this theoretical choice does not eliminate the constitutional concerns raised by our current system. First, the system is not one in which all individuals have equal choice in practice. The reality is that race and class now significantly affect the likelihood that one will marry and stay married. The significant differences in marriage rates by race and class may be related to growing structural inequality in our society.[303] "[C]hronic unemployment"[304] statistically lowers a person's likelihood of marrying.[305] But economics alone do not explain the growing marriage gap. Even when one controls for education level, "marriage rates are lower among black women compared with white women."[306] "The proportion of black college graduates aged 25 to 35 who have never married is 60 percent, compared with 38 percent for white college-educated women . . . ."[307] This means that lower income individuals and people of color disproportionately feel the effects of marriage-based rules.

Fragile Families: Debates, Facts, and Solutions, *in* MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 142, 151 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

[301] 406 U.S. 164, 169 (1972).

[302] For analyses of the Court's illegitimacy cases, see generally Maldonado, *supra* note 231; Mayeri, *supra* note 15; Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387 (2012).

[303] *See* CARBONE & CAHN, *supra* note 27, at 195-200 ("We believe—and we believe we have demonstrated in this book—that inequality explains much of the shift we have seen in the family even as the shifts in the family contribute in turn to greater inequality.").

[304] *Id.* at 3.

[305] *See, e.g.*, *id.* at 23 (discussing the Moynihan Report, which "identif[ied] the causal links between increases in male unemployment and higher rates of divorce and non-marital births").

[306] Richard V. Reeves, *Sex, Race, Education and the Marriage Gap*, NEWSWEEK (Apr. 15, 2015, 3:05 PM), http://www.newsweek.com/sex-race-education-and-marriage-gap-322591 [https://perma.cc/Z5J4-PFWR].

[307] *Id.*

Rules that privilege marital families may impose significant harms on nonmarital families. And, critically, exclusion from these protections can impede the ability of these families to "safeguard[]" the needs of the children and others in these families.[308] Refusing to extend leave under the Family and Medical Leave Act to care for a sick nonmarital partner,[309] for example, surely makes it harder for nonmarital partners to care for each other during times of sickness. The gay rights canon also teaches that courts must be suspicious of laws that seek to demean a group of people, or that seek to impose a moral code.[310] As noted above, rules privileging marital families may indeed send this message.

Finally, the principles suggest that social and legal changes are relevant in identifying constitutional violations. Historically, most children were reared and cared for in marital families. But family structures have changed. About forty percent of all children in the United States are born and raised in other family forms.[311] Nonmarital families are also increasingly caring for other family members, including nonmarital partners or extended family members. The gay rights canon directs that these changes must be taken into account when assessing the permissibility of practices that penalize those living outside of marriage.[312] Our evolving social experience can render visible unfairness and oppression that previously went unseen. This is true, even if the law was not designed or intended to harm the group in question.[313]

3. (Unique) Keystone of Our Social Order

I now return to the tautological second basic "attribute," that marriage is a union "unlike any other," as well as to the final element identified by Justice Kennedy in *Obergefell*, that marriage is a keystone of our social order. Historically, almost all families were marital families.[314] Even as late as 1960,

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[308] Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

[309] 29 U.S.C. § 2612(a)(1)(C) (2012) ("[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition."); *see also* Joslin, *supra* note 20, at 167.

[310] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571 (2003) ("Our obligation is to define the liberty of all, not to mandate our own moral code." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992))).

[311] CHILD TRENDS DATABANK, *supra* note 297, at 3.

[312] *Obergefell*, 135 S. Ct. at 2603 ("[N]ew insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.").

[313] Tribe, *supra* note 37, at 19 ("Justice Kennedy's opinion strongly argues that a government practice that limits options available to members of a particular group need not have been *deliberately* designed to harm the excluded group if its oppressive and unjustified effects have become clear in light of current experience and understanding.").

[314] The exception to this, of course, is slaves, who were prohibited from marrying.

the overwhelming majority of children—ninety-five percent—were born to married women.[315] Given the predominance of the marital family, it is not surprising that marriage was viewed as a keystone in our social order. For similar reasons, most people historically viewed marital relationships as "unlike any other."[316]

But families today look much different than they did fifty years ago. The marital family is no longer nearly as dominant as it once was. About half of all U.S. adults are unmarried and forty percent of all children in the United States are born to unmarried women.[317] And again, in some communities, the percentages are much higher.[318]

With these changes in demographics have come changes in beliefs about the family. A study conducted in 2008 found that almost forty percent of respondents reported that marriage is becoming obsolete.[319] The perception of what constitutes a "family" is much broader today than it used to be.[320] A recent study from the Pew Research Center, for example, found that the American public is "much more open to new family arrangements."[321] Marriage is still important to many people. But at the same time, the divide between marriage and other types of family structures is far less rigid than it was in the past. Adults today are much more likely to consider the term "family" to include forms other than the marital family.[322]

Thus, both as a matter of fact and as a matter of perception, the marital family is no longer the sole "building block of our national community."[323] Other family forms are increasingly serving as critical parts of our social order. And these other family forms are increasingly taking on the functions of the

Franke, *supra* note 296, at 252; Courtney G. Joslin, *The Evolution of the American Family*, HUM. RTS., Summer 2009, at 2, 2.

[315] PEW RESEARCH CTR., *supra* note 26, at 1; *see also* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 364-65 (2012) (explaining that "41% of children [were] born to unmarried women in 2008" as "compared to 5% in 1960").

[316] *Obergefell*, 135 S. Ct. at 2599.

[317] PEW RESEARCH CTR., *supra* note 26, at 1; CHILD TRENDS DATABANK, *supra* note 297, at 3.

[318] PEW RESEARCH CTR., *supra* note 26, at 1; CHILD TRENDS DATABANK, *supra* note 297, at 3.

[319] PEW RESEARCH CTR., *supra* note 26, at 1.

[320] *Id.* at 4 ("And the public is quite open to the idea that marriage need not be the only path to family formation. An overwhelming majority says a single parent and a child constitute a family (86%), nearly as many (80%) say an unmarried couple living together with a child is a family, and 63% say a gay couple raising a child is a family.").

[321] *Id.* at 13 ("Nearly half of those younger than 30 (46%) say the growing variety of family arrangements is a good thing. This compares with 35% of those ages 30 to 49 and fewer than three-in-ten of those ages 50 and older.").

[322] *Id.* at 4.

[323] Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

marital family—including the critical roles of raising and caring for children and other family members. As the gay rights canon teaches, these demographic and social changes must be taken into account when considering whether the denial of critical benefits to nonmarital families is constitutionally permissible. In the past, almost all adults married. The fact that so many rights, benefits, and protections turned on marital status likely seemed fair and appropriate in such a world. Indeed, courts long have assumed that such a system is permissible.[324] But such a world no longer exists.

Under a dynamic theory of constitutional rights, the scope of protection is not limited to what was protected in the past.[325] As Justice Harlan explained in his dissent in *Poe*[326] (which Justice Kennedy in turn cited in *Obergefell*[327]), a reviewing court must consider not only "the traditions from which [a practice] developed," but also "the traditions from which it broke."[328] Marriage alone is no longer the "building block of our society" and the "keystone of our social order";[329] today it has been joined by the nonmarital family. The fact that a significant portion of American adults lives outside of marriage is relevant to whether a legal system that continues to privilege marital relationships is constitutionally permissible.

The legal treatment of nonmarriage has evolved as well. Historically, nonmarital families were denied rights and protections in part because the

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[324] *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) ("Although we recognize the well-established public policy to foster and promote the institution of marriage, perpetuation of judicial rules which result in an inequitable distribution of property accumulated during a nonmarital relationship is neither a just nor an effective way of carrying out that policy." (citation omitted)); Mayeri, *supra* note 15, at 1344 ("Courts scrutinized the relationship between means and ends, but ultimately upheld the government's interest in discouraging nonmarital sex, cohabitation or childbearing, and in encouraging marriage and legitimate family relationships.").

[325] *Obergefell*, 135 S. Ct. at 2602 ("The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."); *see also id.* at 2603 ("Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.").

[326] 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[327] *Obergefell*, 135 S. Ct. at 2598-99.

[328] *Poe*, 367 U.S. at 542; *see also* Lawrence v. Texas, 539 U.S. 558, 571-72 (2003) ("In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'" (quoting Cty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

[329] *Obergefell*, 135 S. Ct. at 2601.

relationships themselves were criminal.[330] By contrast, today it is now clearly established that individuals have a constitutionally protected right to choose to be in nonmarital family relationships.[331] In the civil context, courts in most states now recognize that agreements between unmarried cohabitants are not void as against public policy.[332] The move from "[o]utlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[333] *Obergefell*, together with the other gay rights cases, provides the building blocks to make the case that at least some laws that deny meaningful protection to nonmarriage present serious constitutional claims.

C. *Extending Protections in New Ways*

Some may resist this rereading as too far-fetched.[334] Certain members of the Court—Justice Kennedy in particular—seem to view marriage as distinctly different from, and indeed distinctly better than, other types of family relationships. It would be inconsistent with the Court's intention, one may say, to rely on *Obergefell* and the rest of the gay rights canon to establish protection for the nonmarital family.

But, of course, on many occasions, the Court has extended constitutional protections beyond their original scope. One need look no further than the source of the constitutional right to privacy—*Griswold v. Connecticut*[335]—to find one such example. Although Justices could not agree on the constitutional source of the protection in *Griswold*,[336] they did agree that this right to privacy

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[330] *See, e.g.*, McFadden v. Elma Country Club, 613 P.2d 146, 150 (Wash. Ct. App. 1980) (holding that the existence of a statute criminalizing cohabitation "would seem to vitiate any argument that the legislature intended 'marital status' discrimination to include discrimination on the basis of a couple's unwed cohabitation").

[331] *See Lawrence*, 539 U.S. at 571-72 ("[O]ur laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

[332] *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) ("In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.").

[333] *Obergefell*, 135 S. Ct. at 2600.

[334] By contrast, others agree with this claim. *See, e.g.*, Tribe, *supra* note 37, at 31 ("Such precedents would be difficult to cabin in any principled way that does not encompass a *right to remain unmarried* without suffering penalties for that choice.").

[335] 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.").

[336] Donald L. Beschle, *Kant's Categorical Imperative: An Unspoken Factor in*

was one that inhered in the marital relationship.[337] But just seven years later, while acknowledging the right's original grounding in the marital relationship,[338] the Court boldly declared that unmarried individuals must have the same right to access contraception:[339]

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible . . . . If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[340]

The marriage equality cases follow a similar trajectory. In its past cases, the Court assumed that the fundamental right to marry included only marriages between one man and one woman.[341] That assumption, however, did not preclude the Court in later cases from applying the right more broadly. The critical question was not who was included in the right to marry in the past. Indeed, as the Court explained, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[342] Thus, the meaning and scope of constitutional rights must evolve alongside legal, cultural, and social changes.

These principles must be applied equally to nonmarriage. Marriage was once the overwhelmingly dominant family structure. That is simply no longer the case. Moreover, we now recognize that it is unconstitutional to force all individuals to choose marriage as the space in which to express their love,

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Constitutional Rights Balancing, 31 PEPP. L. REV. 949, 950 (2004).

[337] *See, e.g.*, *Griswold*, 381 U.S. at 486 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."); *id.* (Goldberg, J., concurring) ("I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy . . . ."); *id.* at 507 (White, J., concurring) ("I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.").

[338] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("It is true that in *Griswold* the right of privacy in question inhered in the marital relationship.").

[339] *Eisenstadt* was decided on equal protection, rather than due process grounds. The decision nonetheless "reflected a sea change in law's approach to nonmarriage." Murray, *supra* note 3, at 1221. For a fascinating and in-depth analysis of the *Eisenstadt* decision and its implications, see generally Susan Frelich Appleton, *The Forgotten Family Law of* Eisenstadt v. Baird, 28 YALE J.L. & FEMINISM 1 (2016).

[340] *Eisenstadt*, 405 U.S. at 453 (emphasis in original).

[341] Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) ("It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners.").

[342] *Id.* at 2602.

affection, and sexual intimacy.[343] The Court may soon recognize that, just as was true for same-sex couples, the Constitution may require more than the elimination of outlaw status for people who live outside of marriage; it may require the provision of substantive protections to these families.

D. *Earlier Glimmers of a Right to Nonmarriage*

Although the Court has never expressly embraced a broader right to form families, glimmers of such a right appear in past Supreme Court opinions. Forty years ago, the Court declared that the constitutionally protected right to form a family is not limited to the nuclear, marital family. Take *Moore v. City of East Cleveland*.[344] In *Moore*, a grandmother was criminally convicted for violating a zoning ordinance because she was housing two grandchildren who did not have the same parents.[345] In holding the ordinance unconstitutional, the Court rejected the City's argument that "any constitutional right to live together as a family extends only to the nuclear family."[346] As the Court explained, "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family."[347]

In other cases, at least some members of the Court suggested an even broader right to form the family of one's choice. Some of the canonical "parental" rights cases, for example, did not involve parents in the traditional sense. In *Prince v. Massachusetts*[348]—a seminal case establishing that parents have a constitutional right to control their children's care—the woman who brought suit was the child's aunt, not her legal or biological parent.[349] The Court has also declared that nonmarital parents and their children are entitled to substantive protections.[350]

To be sure, a majority of the Court has never expressly embraced a broad right to nonmarriage. Some members of the Court, however, have embraced this position. Justice Marshall argued for the existence of such a right in his opinion dissenting from a denial of certiorari in *Hollenbaugh v. Carnegie Free Library*.[351] The case was brought by a woman and a man who were fired from

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[343] Lawrence v. Texas, 539 U.S. 558, 574-75 (2003) (striking down all remaining sodomy statutes).

[344] 431 U.S. 494 (1977).

[345] *Id.* at 496-97.

[346] *Id.* at 500.

[347] *Id.* at 504.

[348] 321 U.S. 158 (1944).

[349] *Id.* at 159.

[350] *See, e.g.*, Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding that nonmarital children have a right to child support); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) (striking down a law that discriminated against nonmarital children); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (striking down a law that precluded nonmarital children from suing for the wrongful death of their mother).

[351] 439 U.S. 1052, 1056 (1978) (Marshall, J., dissenting).

their jobs at a library because the woman was pregnant out of wedlock, and the two of them were living together, despite the fact that the man was still married to another woman.[352] The district court and the appellate court concluded that their terminations were permissible.[353] In his dissent from the denial of certiorari, Justice Marshall argued that the terminations had to be evaluated under some standard of scrutiny greater than rational basis review. He wrote:

> Petitioners' choice of living arrangements for themselves and their child is . . . sufficiently close to the interests we have previously recognized as fundamental and sufficiently related to the constitutional guarantee of freedom of association that it should not be relegated to the minimum rationality tier of equal protection analysis . . . .[354]

This more robust position drew on his earlier dissenting opinion in *Village of Belle Terre v. Boraas*,[355] which involved a challenge to a zoning ordinance that limited occupancy of unrelated people in single family homes to two people.[356] In *Belle Terre*, Justice Marshall declared: "I am still persuaded that the choice of those who will form one's household implicates constitutionally protected rights."[357]

Scholars pressed such claims to the Court. In 1969, John Gray and David Rudovsky published an article in which they challenged the constitutional permissibility of marital supremacy. "[W]hether formal marriage promotes the interests traditionally associated with that institution," they wrote, "certainly is subject to reexamination in light of developing concepts of individual freedom and morality."[358] Litigants also made similar arguments. This was the case in *King v. Smith*,[359] which challenged Alabama's "man-in-the-house" rule under which Mrs. Sylvester Smith was "disqualified from public aid because she had a lover who regularly stayed over on Saturday nights."[360] Smith's lawyer, Martin Garbus, argued that the Alabama rule "violate[d] her privacy" and was "destructive of her personal relationships," and thus violated her constitutional rights.[361] As Serena Mayeri explains, Garbus's brief "did not concede

[352] *Id.* at 1053 (describing the relationship and living arrangement of the petitioners).

[353] Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328, 1334 (W.D. Pa. 1977), *aff'd*, 578 F.2d 1374 (3d Cir. 1978).

[354] *Hollenbaugh*, 439 U.S. at 1056 (Marshall, J., dissenting).

[355] 416 U.S. 1 (1974).

[356] *Id.* at 2.

[357] *Id.* at 18 (Marshall, J., dissenting).

[358] John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana *and* Glona v. American Guarantee & Liability Insurance Co., 118 U. PA. L. REV. 1, 17 (1969).

[359] 392 U.S. 309, 320-21 (1968).

[360] ELIZABETH H. PLECK, NOT JUST ROOMMATES: COHABITATION AFTER THE SEXUAL REVOLUTION 55 (2012).

[361] Brief for Appellees at 8, King v. Smith, 392 U.S. 309 (1968) (No. 949).

Alabama's 'right to regulate nonmarital relationships' and 'prohibit immoral conduct'; rather, [it] echoed [others'] skepticism about such regulations' constitutionality."[362]

In those earlier cases, a majority of the Court seemed reluctant to embrace a robust constitutional right to form families of choice. The Court was willing to conclude that unmarried individuals have the right to access contraception.[363] But beyond that, it was not clear what other rights these nonmarital couples were entitled to. Complicating the question was the reality that many states still criminalized sex and cohabitation between unmarried individuals.[364] And many people, including members of the Court, assumed that these criminal laws were constitutional, despite some victories on behalf of those living outside of marriage.[365] If it was permissible to criminalize these relationships, surely it was permissible to subject individuals in these relationships to disfavored treatment under the civil law.[366]

But much has changed since then. Laws criminalizing sexual intimacy between unmarried individuals are unconstitutional.[367] Almost all states recognize and enforce agreements between cohabitants.[368] Individuals have a constitutional right to have children outside of marriage.[369] These legal changes have occurred alongside dramatic demographic and social changes. About half of American adults today are unmarried.[370] Over forty percent of all children born in the United States today are born to unmarried women.[371] Nonmarriage has joined marriage as a core building block of our society.[372]

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[362] Mayeri, *supra* note 15, at 1298.

[363] Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).

[364] *See, e.g.*, BOWMAN, *supra* note 16, at 16 (noting that in 1978, "fornication was a crime in fifteen states . . . and cohabitation in sixteen").

[365] *See, e.g.*, Mayeri, *supra* note 15, at 344 ("Courts scrutinized the relationship between means and ends, but ultimately upheld the government's interest in discouraging nonmarital sex, cohabitation or childbearing, and in encouraging marriage and legitimate family relationships." (footnote omitted)).

[366] *Cf.* Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.").

[367] *See* Lawrence v. Texas, 539 U.S. 558, 578-89 (2003).

[368] BOWMAN, *supra* note 16, at 47.

[369] *See* Estin, *supra* note 128, at 1407.

[370] *See supra* note 115 and accompanying text.

[371] Huntington, *supra* note 32, at 168-69.

[372] *See* Appleton, *supra* note 315, at 364-65 ("[E]mpirical data show marriage's decreasing prevalence in lived experience and in public opinion about family life—with only 52% of adults married in 2008 (compared to 72% in 1960), 41% of children born to unmarried women in 2008 (compared to 5% in 1960), and a majority of survey respondents defining 'family' to include various departures from the traditional norm of a married couple with children." (footnotes omitted)).

E. *Scope and Boundaries of the Right to Nonmarriage*

In sum, when viewed through the lens of the gay rights canon, *Obergefell* provides a road map for asserting a constitutional right to nonmarriage. The choice to be in a particular nonmarital relationship, like the choice to be in a particular marital relationship, may be an important aspect of individual autonomy. Many individuals engage in other protected liberties in their nonmarital relationships. Unmarried individuals are taking on an increasing share of child and family caretaking. And nonmarriage has joined marriage as a critical building block in our society.

Just because nonmarriage may be entitled to constitutional protection, however, does not mean that all laws that distinguish between marital and nonmarital families are unconstitutional. A core principle of the gay rights canon is the dynamic and synergistic relationship between principles of liberty and equality.[373] This stereoscopic constitutional lens is powerful because thinking about liberty and equality simultaneously can enable courts to appreciate constitutional violations that could escape detection under a rigid monoscopic theory.[374]

At the same time, however, as Abrams and Garrett have explained, this dynamic, less rigid approach to constitutional theory also offers an important limiting principle.[375] Under a traditional, rigid, monoscopic constitutional approach, once a right is deemed fundamental, a court must always subject infringements of that right to strict scrutiny.[376] And, of course, few laws survive strict scrutiny analysis.[377] By contrast, under the hybrid or synergistic approach, the carefulness of the inquiry depends on the specifics of the case before the court. If the harm at issue is less significant, or if the equality concerns are less pronounced, the court applies a less demanding inquiry. As a result, more infringements may pass constitutional muster than would be the case if strict constitutional scrutiny were always required.[378]

This flexible, case-specific method of constitutional analysis may be especially appropriate in the context of nonmarriage. This is true because there are some contexts in which the extension of particular rights or protections to married spouses, but not to persons living in nonmarriage, may be justifiable. This may be true, for example, if the denial in question results in a less severe

[373] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 564 (2003).

[374] *See* Karlan, *supra* note 154, at 474.

[375] *See* Abrams & Garrett, *supra* note 146 (manuscript at 29-30) (discussing "cumulative rights as constraints").

[376] *See, e.g.*, *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (arguing that "if homosexual sodomy *were* a 'fundamental right'" under the Due Process Clause, strict scrutiny would apply).

[377] *See, e.g.*, Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (stating that heightened scrutiny is "'strict' in theory and fatal in fact").

[378] *See supra* Section III.A.1.

harm, or where the equality concerns are less pronounced. By contrast, there may be other contexts where the denial of rights to those living in nonmarriage raises a more serious claim. The approach of the gay rights canon gives courts the ability to apply a more nuanced analysis.

There are challenges, of course, to a sliding-scale approach. The greatest challenge being that the test is vague and malleable. But just because the test may be harder to apply does not mean that it should be abandoned or rejected. In the Part that follows I begin to sketch out what this right may look like and how it might apply in a range of contexts.

V. THE RIGHT TO NONMARRIAGE

A. *Mapping the Right*

What would it mean to recognize a right to nonmarriage? First, to be clear, the claim I am constructing here is one that grows out of the gay rights tradition. Therefore, this right is one that is grounded in principles of both due process and equal protection, and one that defies the traditional rigid, tiered framework. Thus, the level of constitutional scrutiny varies depending on the specific claim before the court. As a result, in some contexts, the differential treatment of marriage and nonmarriage may be permissible, while in others the opposite may be true. Accordingly, mapping the contours of this contextual right is not a simple endeavor. To help begin this process, I highlight several types of marriage-based rules that would be particularly vulnerable to constitutional challenge, and another that presents a closer question.

One type of rule that raises significant constitutional concerns under this theory is that which denies any meaningful property-related claims to unmarried partners upon the dissolution of their relationship. In the absence of a valid premarital agreement, all fifty states divide the available marital or community property equally or equitably upon divorce.[379] Generally speaking, these sharing rules do not apply to unmarried cohabitants.[380] Some states go much further. In a few states, unmarried cohabitants are not only excluded from the property division rules that apply to married spouses, but they are also precluded from asserting even common law or contract claims that any other person—married or unmarried—could assert. The Illinois Supreme Court, for example, recently reaffirmed such a rule in *Blumenthal v. Brewer*.[381]

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[379] *See* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1230 ("Although variations exist among the states, every state's default approach is now designed to effectuate an equal or equitable division of all property accumulated from wages during marriage, regardless of the title of that property." (footnotes omitted)).

[380] *See, e.g.*, Estin, *supra* note 128, at 1395 ("In most states, however, one [cohabitating] partner does not share in the other's financial gains from employment or investment and is not compensated for financial support or household services provided to the other partner.").

[381] 2016 IL 118781, ¶ 79.

There are plausible arguments in favor of applying different property division rules to married and nonmarital couples. For example, some research suggests that, on the whole, nonmarital relationships are different from marital relationships in important ways. Cohabitants, this research suggests, are less likely to be financially interdependent, and their relationships tend to be more conflicted and less stable.[382] Given these differences, a default rule of equal sharing may not be appropriate in the context of nonmarital relationships.

Even assuming arguendo that different rules may be appropriate in the context of property division, the *complete denial of protection* to nonmarital partners nonetheless raises a serious constitutional claim. In upholding such a rule, the Illinois Supreme Court did not conclude that these individuals are not in need of protection. Instead, the *Blumenthal* court stated that it was necessary to apply such a rule in order to advance "the state's interest in marriage."[383]

There is a powerful argument that such a rule violates the right to nonmarriage. This rule imposes significant harms. The rule not only denies critical financial protections to nonmarital cohabitants, but it also infringes and penalizes the exercise of constitutionally protected liberties. Individuals have a constitutionally protected right to form and live in nonmarital relationships.[384] Denying a person a legal claim that he or she would otherwise have *because* he or she has chosen to live in a nonmarital, marriage-like relationship penalizes the exercise of this liberty interest. Moreover, because those living in nonmarriage are disproportionately likely to be nonwhite and to have a lower socioeconomic status, this rule raises significant equality concerns.[385]

The gay rights canon also teaches that courts should be wary of rules that impose stigma on a group of people, especially when that group has experienced a long history of discrimination.[386] That is just what the rule reaffirmed by the Illinois Supreme Court is intended to do. The rule is intended to penalize the choice of living in nonmarriage in order to channel individuals into what the state considers to be the morally appropriate family form. The Illinois Supreme Court was quite clear about that goal. The court explained that the state can "disfavor[] the grant of mutually enforceable property rights to knowingly unmarried cohabitants" in order to further the state's "strong

[382] *See, e.g.*, Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, *in* RECONCEIVING THE FAMILY 305, 308-09 (Robin Fretwell Wilson ed., 2006) ("Cohabitants are much less likely than married couples to have children together, to pool their resources, to feel secure and unconflicted in their relationships, to value commitment, or to express commitment to their partners." (footnotes omitted)).

[383] *Blumenthal*, 2016 IL at ¶ 79.

[384] Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

[385] *See supra* Part II.

[386] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (recognizing that "laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter").

continuing interest in the institution of marriage."[387] Given the significant harms imposed by this rule and in light of the very serious equality concerns it raises, it likely would fail constitutional muster under this theory of nonmarriage.

Other laws that may violate the right to nonmarriage are laws establishing the parentage of children born through assisted reproductive technology ("ART").[388] Either by statute or through common law, most states treat a spouse as the legal parent of a child born to his or her wife through assisted reproduction.[389] The determination of parentage is based on the spouse's consent to the insemination with the intent to parent the resulting child.[390] Thus, if the spouse does not consent, and does not subsequently parent the child, the spouse will not be recognized as a parent. In most states, however, these ART rules are limited to married couples.[391] As a result, when a child is born to an unmarried couple through ART, the nonbirth partner may be considered a legal stranger to the resulting child.[392]

The exclusion of unmarried couples can cause significant tangible and stigmatic consequences. Most importantly, the rules inhibit the ability of unmarried individuals to have legally recognized relationships with their children. Legally recognized parents have constitutionally protected interests in the care and control of their children.[393] There are a host of profound harms that may be inflicted—on the adult and on the child—if a functional parent is not recognized as a legal parent. The adult may not have a right to maintain a relationship with the child over the objection of the child's legal parent.[394] Both the child and the adult may be denied financial benefits that normally would flow by virtue of a legally recognized parent-child relationship. These benefits include, but are not limited to, the right to sue for wrongful death, and the right of the child to receive benefits in the event of the adult's disability.[395]

Marriage-only ART rules also send a message that nonmarital families are inferior and unworthy of legal protection. But regardless of marital status,

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[387] *Blumenthal*, 2016 IL at ¶ 79.

[388] For a thoughtful and comprehensive examination of the future of parentage rules in the wake of marriage equality, see generally NeJaime, *supra* note 30.

[389] *See* Joslin, *supra* note 24, at 1184-85.

[390] *Id.* at 1185 ("These statutes generally provide that the husband will be considered the child's legal parent if he consented to his wife's insemination.").

[391] *Id.*

[392] *See, e.g.*, Jones v. Barlow, 154 P.3d 808, 809-10 (Utah 2007) (holding that a woman lacked standing to seek custody or visitation with a child born to her former same-sex partner during their relationship).

[393] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

[394] *See, e.g.*, Joslin, *supra* note 28, at 511.

[395] *See, e.g.*, Joslin, *supra* note 24, at 1194-217.

individuals who use ART engage in the very same conduct. Married and unmarried individuals alike engage in a deliberate course of conduct with the intention of having a child that they will parent together. It is possible to adopt rules that do not turn on marital status.[396] Indeed, a growing number of states already have ART rules that apply equally to married and unmarried couples.[397] When viewed through a constitutional analysis that is pro-equal liberty, anti-stigma, and dynamic, marriage-only ART rules present a serious constitutional claim.

Zoning ordinances—a topic the Court has grappled with before—may likewise be vulnerable to constitutional challenge. In past cases, the Court considered the constitutionality of laws that excluded various nonmarital family members. This first wave of challenges to zoning ordinances achieved mixed results. In *Moore*, the Court struck down an ordinance that prevented a grandmother from living with her two biological grandchildren.[398] *Moore* suggested that some zoning ordinances that prevented nonnuclear family members from living together were suspect.[399] But three years earlier, in *Belle Terre*, the Court upheld a zoning ordinance that precluded more than two unrelated people from living together.[400] Read together, these cases suggested that zoning ordinances could not draw the line at the nuclear family. They could, however, draw the line at the biological family. And some jurisdictions still have narrowly drawn zoning ordinances that slice deeply into nonmarital families.[401]

When considered in light of the principles of the gay rights canon, a contemporary zoning ordinance that requires all individuals in the home to be related to one another through marriage or biology would be constitutionally vulnerable. While less common than they once were, zoning ordinances of this type still exist. For example, the Louisiana Supreme Court recently upheld a local zoning ordinance that prohibited more than two unrelated people from

[396] Elsewhere I argue in favor of marital status neutral assisted reproduction parentage rules. *See id.* at 1224; Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 703 (2005).

[397] *See, e.g.*, JOSLIN, MINTER & SAKIMURA, *supra* note 83, § 3:3. The Uniform Parentage Act similarly includes a marital status neutral assisted reproduction rule. *See* UNIF. PARENTAGE ACT art. 7 (UNIF. LAW COMM'N 2002).

[398] 431 U.S. 494, 499-500 (1977) ("When thus examined, this ordinance cannot survive.").

[399] *See id.* at 500 ("The ordinance would permit a grandmother to live with a single dependent son and children, even if his school-age children number a dozen, yet it forces Mrs. Moore to find another dwelling for her grandson John, simply because of the presence of his uncle and cousin in the same household.").

[400] 416 U.S. 1, 7-9 (1974).

[401] *See, e.g.*, City of Baton Rouge v. Myers, 13-2011, p. 21 (La. 5/7/14); 145 So. 3d 320, 325.

renting a house together.[402] A zoning ordinance of this type would prevent a significant number of families from being able to live together and to care for one another. This harm is significant. The home is one of the most protected spaces.[403] Being unable to live together would affect other fundamental liberties—such as the right to engage in sexual intimacy,[404] the right to engage in procreation,[405] and the freedom of association. The groups that would feel the force of these rules most poignantly would be groups that are already marginalized and vulnerable. The effects of these rules would be felt disproportionately by families of color and poor families. These zoning ordinances thus strike at the heart of equal liberty.

Zoning rules of this type also send a message that the excluded families are not as real or as worthy as marital families. Real families live together and care for one another. And the families that would be negatively affected—tangibly and stigmatically—by this type of exclusionary zoning ordinance would be disproportionately nonwhite and lower income.[406] Finally, in evaluating the constitutionality of these rules, courts must account for our evolving societal experiences, including the fact that families are increasingly living outside of marriage.

Alternative rules that avoid these results are not difficult to imagine. One such possibility would be a zoning rule that requires parties to declare that they are a family, or that they share caretaking responsibilities with one another. Alternatively, the zoning ordinance could be based on a numerical limit, rather than on legally recognized relationships. Indeed, many jurisdictions in the United States today do use zoning rules that are not premised on marriage.

The examples above present particularly strong claims that the existing rules privileging marriage over nonmarriage may be impermissible. Rules extending spousal financial benefits may pose more difficult questions. Currently, many benefits are distributed to families based on legally recognized marital relationship between adults.[407] Many of these benefits provide financial protection to one spouse upon the death or disability of the other.[408]

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[402] *Id.* at 337-38.

[403] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.").

[404] *Id.* at 578 (holding that unmarried individuals have a constitutionally protected right to engage in consensual sexual intimacy).

[405] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[406] *See supra* note 136 and accompanying text.

[407] Scott & Scott, *supra* note 22, at 306 ("Marriage confers tangible financial benefits and privileges, including social-security survivor benefits, estate-tax exclusions, and health-insurance benefits for government employees, as well as the opportunity to protect property from creditors.").

[408] *Cf. id.* at 308 (pointing out that individuals in nonmarital relationships "receive little support or recognition from the state" because they usually do not receive social security

Compensation is provided because it is presumed that the healthy or surviving spouse was financially dependent upon the injured or deceased spouse.[409] These benefits include, for example, spousal workers' compensation benefits and the right to sue for the wrongful death of a spouse.[410]

Data suggests that married spouses are more likely than unmarried partners to care for and support each other.[411] In addition, married spouses have legal obligations to care for one another.[412] The same is not true of unmarried partners.[413] Therefore, one may argue, there is a strong basis for limiting benefits to married spouses. This claim has strong purchase. These rules indeed may be less vulnerable to challenge.

These benefits rules, however, may still violate the right to nonmarriage. The consequences of the marriage-only benefits rules can be profound. Take, for example, laws that limit wrongful death claims to legally married spouses.[414] Many nonmarital partners are financially interdependent. If one partner was relying solely on the other for financial support, the inability to sue for the breadwinner's wrongful death could lead to financial ruin. It could inhibit the ability of the survivor to adequately care for him or herself and for any children they were raising together. To the extent that the survivor was dependent on the decedent, denying benefits is inconsistent with the purpose of the statute.

Of course, if one abandoned the bright line rule of marriage, one would need some criteria to determine who should be entitled to sue for wrongful death. There are existing models from which to draw. Some states permit individuals who are named as beneficiaries in the decedent's will to sue for wrongful death.[415] Such a rule is broader than a marriage-only rule, but it likely would have class-based effects because individuals with greater resources are more likely to have a will. Another possible approach is the function-based test used

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spousal benefits, estate tax advantages, inheritance rights, or health insurance benefits).

[409] BOWMAN, *supra* note 16, at 70 (describing that workers' compensation and unemployment insurance benefits are generally available to cover dependents of workers who died or were injured in workplace accidents, so as "to provide for dependent family members who have lost the wage earner on whom they depend").

[410] *Id.* at 70-74.

[411] *See, e.g.*, Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 840 (2005) ("Cohabitants are much less likely than married couples . . . to support their partners." (footnote omitted)).

[412] Scott & Scott, *supra* note 22, at 307.

[413] *Id.* at 306-07.

[414] *See* WEISBERG & APPLETON, *supra* note 21, at 410; *see also cf.* Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988) (holding that an unmarried partner could not sue for negligent infliction of emotional distress).

[415] *See, e.g.*, MICH. COMP. LAWS § 600.2922(3)(c) (1961) (providing that "[t]hose persons who are devisees under the will of the deceased" are entitled to sue for wrongful death).

by two states in the context of negligent infliction of emotional distress claims. In *Graves v. Estabrook*,[416] the New Hampshire Supreme Court rejected the bright line marriage rule in favor of a more holistic test that looks to the nature of the relationship between the individuals.[417] Among other things, the test looks to the "extent and quality of shared experience," whether the parties "were members of the same household," and the "particulars of their day to day relationship."[418]

Whether a particular rule or practice violates the constitutional right to nonmarriage will depend on the facts of the case. The reviewing court will need to consider the extent of the harm imposed, whether nonmarital families equally fulfill the purpose of the challenged law or restriction on benefits, as well as whether other available standards could be employed. But the fact that the scope of the right may be difficult to pin down should not preclude courts and policymakers from attempting to apply it when a claim is presented.

B. *The Limitations*

Some may argue that the right I have begun to sketch out above, while not limited to marriage, remains limited or regressive. These critics may contend that this Article argues for a right that moves only a bit beyond the shadow of marriage. That is, while there may be some situations where a court may conclude that the refusal to extend marital protections to unmarried individuals is unconstitutional, this is likely only where those unmarried individuals are living in a way that looks a lot like that of a marital family.

This surely is a possible, if not likely, result. This result is certainly something to be aware of. That said, even if the protection extended only this far, it would nonetheless be an important step forward for the millions of American adults and their children living outside of marriage.

Even if the newly protected group were relatively narrowly defined, the protection the group would receive would be critically important. Moreover, the effects of this constitutional rule would be felt beyond the walls of the courtroom. This rule would force policymakers to more carefully assess whether the many marriage-only rules make sense. Policymakers would be forced to think more deeply about the purpose of the rule in question, and whether the classification protects the people who need protection. Polikoff has been urging this type of inquiry for years.[419] If the law incentivized this type of reflection, it might lead to even broader protections for nonmarriage, protections that extend beyond the shadow of marriage.

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[416] 818 A.2d 1255 (N.H. 2003).

[417] *Id.* at 1259.

[418] *Id.* at 1262 (quoting Dunphy v. Gregor, 642 A.2d 372, 378 (N.J. 1994)).

[419] *See* POLIKOFF, *supra* note 96, at 212 ("By matching relationships to the purpose of a law it is possible to meet the needs of today's families.").

CONCLUSION

Marriage equality skeptics are right to raise concerns about the future of nonmarriage. Increasing numbers of Americans live in nonmarital families. Marriage equality skeptics are also right to be attuned to the possibility that *Obergefell* could negatively impact the law and culture of nonmarriage. There is no denying it. The *Obergefell* decision glorifies marriage and denigrates nonmarriage. As Widiss previously warned, in rectifying discrimination against LGBT people, it is possible that the Supreme Court created the conditions for reaffirming another form of family discrimination—discrimination against nonmarital families.[420]

But while it is important to be attentive to this possibility, it is also important not to overlook the more radical potential that *Obergefell* holds. This Article offers a counternarrative to this growing criticism of *Obergefell*. By rereading *Obergefell* in light of the gay rights canon, this Article contends that *Obergefell* can support, rather than foreclose, a broader constitutional right to form families, including nonmarital families.

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[420] *See* Widiss, *supra* note 5, at 552 ("Thus, in addressing one form of stigma, it reaffirms another. Even as *Windsor* dramatically expands access *to* key marriage rights, it reaffirms the primacy *of* marriage in ways that are both substantively and symbolically harmful.").